83-916

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether, when the federal government, acting pursuant to 42 U.S.C. (Supp. V) 659, honors a facially valid writ of garnishment issued by a state court to collect alimony or child support owed by a federal employee, the government may be liable for reimbursement if it is later held that the state court lacked personal jurisdiction over the employee.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-60a) is reported at 708 F.2d 680. The opinion of the Claims Court (App., *infra*, 62a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1983. A timely petition for rehearing was denied on July 5, 1983 (App., *infra*, 61a). On September 26, 1983, the Chief Justice extended the

time for filing a petition for a writ of certiorari to and including December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. (Supp. V) 659 *et seq.*, and the pertinent parts of the implementing regulations, 5 C.F.R. Pt. 581, as amended by 48 Fed. Reg. 26279-26294 (1983), are set forth in Appendix D, *infra*, 98a-103a.

STATEMENT

1. In 1974, Congress enacted 42 U.S.C. 659 (amended 1977),[1] which partially waived the traditional sovereign immunity against writs garnishing the salaries of federal employees.[2] Section 659 (now codified as 42 U.S.C. (Supp. V) 659(a)) allowed garnishment of federal salaries to collect alimony and child support payments "in like manner and to the same extent as if the United States * * * were a private person." However, under 42 U.S.C. (Supp. V) 659(f), which was added in 1977,[3] neither the government nor its disbursing officers are liable for amounts paid "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." The term "legal process" is defined by

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[1] Section 659 was originally enacted as part of the Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357.

[2] See *FHA* v. *Burr*, 309 U.S. 242, 244 (1940); *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 19, 20 (1846).

[3] Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, Title V, § 501(a), 91 Stat. 157.

statute as "any writ * * * or other similar process in the nature of garnishment" that, among other things, "is issued by * * * a court of competent jurisdiction" (42 U.S.C. (Supp. V) 662(e)(1)).

2. Respondent, a career Air Force officer, was sued for divorce in Alabama. Served by mail while stationed in Alaska, he failed to make an appearance in the Alabama suit on the advice of counsel[4] that such service was insufficient. The Alabama court then entered a default judgment granting the divorce and ordering the payment of alimony and child support. To enforce that judgment, the court subsequently issued a writ of garnishment for respondent's federal pay. The Air Force Finance Office at Elmendorf Air Base in Alaska notified respondent that the writ had been received (see 42 U.S.C. (Supp. V) 659(d)), and respondent, repeating the advice of counsel, protested that his pay could not be garnished because he had not been served properly in the underlying state court proceeding. However, because the Alabama writ was "regular on its face," the Air Force honored the writ and began garnishing respondent's pay (App., *infra*, 4a, 67a). Several months later, respondent successfully sued in the former Court of Claims for recovery of this money, arguing that the Alabama court had lacked in personam jurisdiction (see *id.* at 68a-81a).

On appeal, a divided panel of the Federal Circuit affirmed (App., *infra*, 1a-60a). The court of appeals noted that the government is immune from suit under Section 659(f) only if payment is made "pursuant to legal process regular on its face" (*id.* at 5a-7a). Observing that "legal process" is defined by 42 U.S.C.

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[4] Respondent was advised by an officer of the Air Force Judge Advocate General's office (App., *infra*, 3a-4a).

662(e)(1) as process "issued by * * * a court of competent jurisdiction," the court concluded (*id.* at 3a-11a) that "competent jurisdiction" means both subject matter and in personam jurisdiction. The court then determined that respondent's contacts with Alabama were insufficient to permit the courts of that state to exercise in personam jurisdiction over him (see *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945)), and accordingly held that the Alabama court was not "a court of competent jurisdiction" and that its garnishment writ was therefore not "legal process" within the meaning of 42 U.S.C. (Supp. V) 659 and 662(e)(1) (App. *infra*, 11a-18a).[5] The court stated (*id.* at 17a (footnotes omitted)):

> [W]e hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.

The court found that the government had such notice here and was consequently liable to respondent for the amount withheld from his salary pursuant to the writ (*id.* at 17a-18a).

Judge Nies dissented (App., *infra*, 20a-55a). She concluded that a private employer would not be liable to respondent under the circumstances of this case

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[5] The court of appeals also suggested (App., *infra*, 8a) that alimony or child support orders entered by a court without personal jurisdiction over the defendant are not "legal obligations" under Section 659(a), which waives sovereign immunity for garnishment writs "for the enforcement, against such individual of his *legal obligations* to provide child support or make alimony payments" (emphasis added).

(*id.* at 21a-31a) and that the government was, in any event, immune from respondent's suit under Section 659(f) because the writ of garnishment was "regular on its face" (App., *infra*, 33a-36a). Judge Nies observed (*id.* at 47a):

> The majority decision will create chaos in how the Government must operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a "substantial claim of jurisdictional irregularity" regardless of the regularity of the process "on its face."

Judge Nies added (*id.* at 42a) that "it would entirely defeat the objective of the garnishment statute * * * if the Government must attempt to defeat the claims of dependent children and spouses, who are the only persons who can garnish federal wages."

REASONS FOR GRANTING THE PETITION

This case presents a question of considerable practical importance concerning the government's obligations when served with a facially valid writ of garnishment. The decision of the court of appeals holding that the government may be held liable in damages for honoring such a writ is contrary to the express language of the federal garnishment statute and its implementing regulations and conflicts with decisions of several other courts of appeals. It places an unmanageable burden on the federal government; in many instances, it will leave federal disbursing officers little choice but to dishonor state court process and stand in contempt; and it will draw the government into marital disputes and cause the government to oppose the alimony and child support claims of former spouses and children, who will otherwise be compelled to depend on public assistance. Review by

this Court is clearly warranted, especially since all suits seeking reimbursement for garnished federal pay may be brought in the Claims Court (28 U.S.C. (Supp. V) 1491).

1. When Congress waived sovereign immunity for certain writs of garnishment (see 42 U.S.C. (Supp. V) 659(a)), it unequivocally provided in 42 U.S.C. (Supp. V) 659(f) that neither the government nor its disbursing officers may be held liable for a payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." In the present case, the court of appeals did not dispute that the garnishment writ was "regular on its face," but the court held that the writ was not "legal process" within the meaning of the garnishment statute. Noting that 42 U.S.C. (Supp. V) 662 (e)(1) defines "legal process" to require issuance by a "court of competent jurisdiction" the court below held that a "court of competent jurisdiction" must have personal, as well as subject matter, jurisdiction and that garnishment writs issued by a court lacking personal jurisdiction are thus not "legal process." Therefore, the court below concluded, when the government honors such a writ despite notice of "a claim of substantial jurisdictional irregularity," the government is not protected from liability by Section 659(f).

The court of appeals' interpretation of the statute is clearly wrong and yields an absurd result. Section 659(f) provides that the government is immune from liability for honoring "legal process regular on its face." If the term "legal process" is limited to process issued by a court with personal, as well as subject matter, jurisdiction, the government is not immune from suit for complying with process that is

"regular on its face," as the plain language of Section 659(f) provides. Instead, the government must look beyond the facial validity of garnishment writs and determine whether the state court that issued the underlying judgment had personal jurisdiction over the defendant. Thus, the court of appeals' construction renders Section 659(f) internally inconsistent.

Apparently recognizing this problem, the court of appeals announced (App., *infra*, 17a (footnotes omitted)) that "the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity." Whatever the merit of this rule—and we will show that it is unworkable (see pages 18-21, *infra*)—it is clearly the court's own invention. The court did not purport to extract it from any provision of the federal garnishment statute, from the legislative history of the statute, or indeed from any other authority.

Moreover, this rule cannot be reconciled either with the plain meaning of Section 659(f) or with the court of appeals' own interpretation of the term "legal process." Section 659(f) unambiguously shields the government from liability whenever it honors a state garnishment writ that is "regular on its face"; whether the government had notice of claims regarding the state court's in personam jurisdiction is immaterial. Notice seems equally immaterial if the court of appeals' interpretation of the phrase "court of competent jurisdiction" is accepted. If a court without personal jurisdiction is not a "court of competent jurisdiction," as the decision below held (App.,

infra, 8a-11a), then a garnishment writ issued by such a court is not "legal process" within the meaning of the immunity provision, and that provision does not apply. Whether or not the government had notice of the jurisdictional defect would not seem to matter.

The court of appeals went wrong when it construed the phrase "court of competent jurisdiction" to mean personal, as well as subject matter, jurisdiction. "Competent jurisdiction" usually means merely subject matter jurisdiction. See, *e.g.*, 1 Restatement (Second) of Judgments 27-28 (1982) ("The term 'subject matter jurisdiction' * * * is also sometimes referred to as 'competence' or 'competency.' "); Restatement (Second) of Conflict of Laws § 92 (1971); Restatement of Judgments § 7 (1942); 2 J. Beale, *The Conflict of Laws* § 432.3 at 1377 (1935) (The competence of a court means "jurisdiction to take up the matter under consideration."); 18 U.S.C. 2510(9) ("judge of competent jurisdiction" means judge with authority to enter a certain type of orders).

This interpretation is also supported by the principle that a statute should be construed, where possible, so as to make its provisions consistent. See, *e.g.*, *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 403 (1975); *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947). Here, interpreting the phrase "court of competent jurisdiction" to refer only to subject matter jurisdiction harmonizes Section 659(f)'s reference to "legal process regular on its face" with Section 662(e)(1)'s definition of "legal process," which requires issuance by "a court of competent jurisdiction." Unlike the lack of personal

jurisdiction, the absence of subject matter jurisdiction is almost always detectable from the face of the process.[6]

Moreover, as the dissent below pointed out (App., *infra*, 21a-31a), the court of appeals' interpretation subjects the federal government to greater liability and administrative burdens than are borne by private garnishees under the laws of many states—a result that Congress almost certainly did not intend. A number of state statutes insulate garnishees from liability under circumstances such as those present in this case. Alabama law, for example, provides that "[t]he judgment condemning the debt, money or effects to the satisfaction of the plaintiff's demand is conclusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment * * *" (Ala. Code § 6-6-461 (1977)). Cal. Civ. Proc. Code § 706.154(b) (West cum. supp. 1983) provides that "an employer who complies with any written order or written notice which purports to be given or served in accordance with the provisions of this chapter [on garnishment] is not sub-

[6] There is no merit in the court of appeals' suggestion (App., *infra*, 8a; see also page 4 note 5, *supra*) that alimony or child support orders entered by a court without personal jurisdiction over the defendant do not fall within Section 659(a), which waives sovereign immunity for garnishment writs for the enforcement of "legal obligations" to furnish child support or pay alimony. As the implementing regulations provide (5 C.F.R. 581.102(g)), a "legal obligation" in this context is one that is "enforceable under appropriate State or local law." Here, the Alabama court enforced respondent's obligations by issuing the writ. Furthermore, the court of appeals' interpretation of the phrase "legal obligation" would seemingly exclude judgments suffering any legal defect.

ject to any civil or criminal liability for such compliance unless the employer has actively participated in a fraud." Similarly, N.Y. Civ. Prac. Law § 5209 (McKinney 1978) states:

> A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

See also Ariz. Rev. Stat. Ann. § 12-1592 (1982); Ark. Stat. Ann. § 31-146 (repl. 1962); Ill. Ann. Stat. ch. 62, § 44 (Smith-Hurd 1972); Ind. Code Ann. § 34-1-11-29 (Burns 1973); Iowa Code Ann. § 642.18 (West 1950); Md. Cts. & Jud. Proc. Code Ann. § 11-601(a) (repl. 1980); Mass. Ann. Laws, ch. 246, § 43 (Michie/Law Coop. 1974); Mo. Ann. Stat. § 525.070 (Vernon 1953); N.H. Rev. Stat. Ann. § 512.28 (repl. 1968); N.J. Stat. Ann. § 2A: 17-53 (West 1952); N.D. Cent. Code § 32-09.1-15 (repl. supp. 1983); Ohio Rev. Code Ann. § 2716.21(D) (Page supp. 1982); Okla. Stat. Ann. tit. 12, § 1233 (West 1961); Tenn. Code Ann. § 29-7-117 (repl. 1980); Wash. Rev. Code Ann. § 7.32.300 (1961).

It seems quite unlikely that Congress intended to treat the government more harshly than private garnishees. Not only has the federal government traditionally been immune altogether from garnishment writs, but the administrative burden on the government, by far the nation's largest employer, would far exceed that of any private garnishee.[7]

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[7] We acknowledge that there is authority for the proposition that "a valid judgment against the defendant is essential

2. The court of appeals also gave insufficient deference to the interpretations of those charged with administration of the federal garnishment statute. See, *e.g.*, *United States* v. *Clark*, 454 U.S. 555, 565 (1982); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Comptroller General has held that a military employee whose salary is garnished pursuant to a facially valid writ is not entitled to reimbursement even if the underlying judgment is set aside for lack of personal jurisdiction.[8] And the implementing regulations issued by the Office of Personnel Management (see 5 C.F.R. Pt. 581), as amended by 48 Fed. Reg. 26279-26294 (1983)) provide that the federal government must comply with a garnishment writ except in certain enumerated circumstances, such as where there are jurisdictional defects apparent "on its face" or where the garnishment is not for alimony or child support (5 C.F.R. 581.305,

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to the validity of a judgment against the garnishee" (App., *infra*, 11a n.5). See Annot., 49 A.L.R. 1411 (1927); 6 Am. Jur. 2d *Attachment and Garnishment* § 400 (1963) and cases cited; 38 C.J.S. *Garnishment* §§ 244 and 293(e) (1943) and cases cited. Many of these cases, however, appear to have been overruled by statutory enactments, and most concern prejudgment garnishment, where the garnishee had the duty to assert certain defenses that would be available to the defendant, including jurisdictional defects (see *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 344 (1969) (Black, J., dissenting). This obligation was important in pre-judgment garnishment because it was not always necessary for the plaintiff to give the defendant notice of the garnishment (see *Sniadach*, *supra* (declaring procedure unconstitutional)).

[8] *In re Technical Sergeant Harry E. Mathews, USAF*, File No. B-203668 (Comp. Gen. Dec. Feb. 2. 1982) (App., *infra*, 109a-112a).

as amended by 48 Fed. Reg. 26280-26281 (1983)). Doubts about in personam jurisdiction over the defendant/employee in the underlying divorce proceedings are not mentioned as a ground for nonpayment.[9]

3. The court of appeals' decision conflicts with *Calhoun* v. *United States*, 557 F.2d 401 (4th Cir.), cert. denied, 434 U.S. 966 (1977), which affirmed summary judgment against a Navy officer who sought recovery of pay garnished to satisfy alimony and child support obligations. The officer contended that the garnishment writ was void because the court that issued the underlying divorce judgment lacked personal jurisdiction over him (557 F.2d at 402). Rejecting that argument, the Fourth Circuit observed (*ibid.*) that the divorce judgment was "facially valid" and added:

> Calhoun is assuredly in a better position to effectively litigate [the issue of personal jurisdiction] than is the United States. The United States was under no duty to contest the judgment, exposing itself to potential double liabilities. It was Calhoun's obligation to attack the judgment if he wished to avoid the deduction from his pay.[10]

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[9] See also 5 C.F.R. 581.305(a)(6)(f), as added by 48 Fed. Reg. 26280 (1983) (App., *infra*, 102a-103a).

[10] The court below attempted to distinguish *Calhoun* on two grounds. First, the court observed (App., *infra*, 10a) that *Calhoun* did not consider the effect of 42 U.S.C. (Supp. V) 659(f), which took effect shortly before the decision in that case. Section 659(f), however, *immunizes* the government from liability for honoring certain writs. We fail to see how Section 659(f) can possibly be interpreted as expanding the government's liability. Thus, Section 659(f) could not have changed the result in *Calhoun*.

This conclusion is supported by the Senate report on the 1977 amendments to the garnishment statute, which stated

Similarly, the Eighth Circuit held in *Overman* v. *United States*, 563 F.2d 1287 (1977), that Section 659 did not permit a suit by a federal employee to enjoin the government from honoring a garnishment writ allegedly procured by fraud. The court concluded (*id.* at 1291) that no statute waived sovereign immunity from such a suit and reasoned that 42 U.S.C. 659 (now codified as amended at 42 U.S.C. (Supp. V) 659(a)) did not provide the requisite waiver but "simply removed the bar of sovereign immunity to one narrow class of actions: enforcement of garnishment writs issued by state courts." [11]

The decision below also conflicts with the District of Columbia Circuit's recent decision in *Rush* v.

(S. Rep. 1350, 94th Cong., 2d Sess. 3 (1976)) that "[i]t is not the purpose of the committee bill to make any major changes in the new child support law. The bill would make modifications, consistent with the original congressional intent, to clarify questions that have been raised [and] to provide for administrative improvement."

The court below also argued (App., *infra*, 17a-18a) that here, "unlike the situation in the *Calhoun* case, the State of Alabama had no 'long-arm' statute at the time of filing of the suit by Mrs. Morton." But as the dissenting judge pointed out (App., *infra*, 30a-31a), "[t]he *Calhoun* court did not exonerate the United States because the underlying judgment was not void, but because in its view, it is not incumbent on an employer to look behind the *facial* validity of the garnishment process." See also *id.* at 30a n.7.

[11] Like *Calhoun*, *Overman* did not discuss Section 659(f). As previously noted, however, Section 659(f) does not expand the government's liability. The court below attempted to distinguish *Overman* because there the underlying judgment was alleged to be defective on the grounds of fraud and not for lack of personal jurisdiction (App., *infra*, 10a-11a). However, since the decision in *Overman* was based on sovereign immunity, this distinction does not seem relevant to *Overman*'s analysis.

United States Agency for International Development, No. 82-1853 (Apr. 26, 1983) (App., *infra*, 104a-107a).[12] There, a federal employee sued for recovery of garnished wages and injunctive relief, claiming among other things that the state court that ordered him to pay child support lacked personal jurisdiction. Noting that the government is immune from suit for payments made pursuant to a garnishment writ that is "regular on its face" (42 U.S.C. (Supp. V) 659 (f)), the District of Columbia Circuit remarked (App., *infra*, 107a):

> In the present case, Rush has not claimed that the garnishment order was facially invalid or that AID violated statutory requirements or applicable regulations. Thus, at least to the extent that Rush seeks reimbursement of funds previously garnished, he is barred by the statute from litigating those claims against AID or its administrator.

The court did not inquire whether the government had notice of any substantial jurisdictional irregularities, as the Federal Circuit's decision requires. See also *Snapp* v. *United States Postal Service—Texarkana*, 664 F.2d 1329 (5th Cir. 1982) (no subject matter jurisdiction of employee's suit to enjoin garnishment); *Jizmerjian* v. *Department of the Air Force*, 457 F. Supp. 820 (D.S.C. 1978), aff'd, 607 F.2d 1001

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[12] Rush's petition for a writ of certiorari (No. 83-382) is pending. As explained in our brief in opposition in that case (a copy of which we are serving on petitioner), we believe that certiorari should be denied in that case. While we are confident that the *Rush* court would decide the present case differently from the Federal Circuit, we think that the Federal Circuit would reach the same result in *Rush* as did the District of Columbia Circuit.

(4th Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *Cunningham* v. *Department of the Navy*, 455 F. Supp. 1370 (D. Conn. 1978); *Popple* v. *United States*, 416 F. Supp. 1227 (W.D.N.Y. 1976).

4.a. The court of appeals' interpretation of the garnishment statute will frustrate Congress's expressed intent. The garnishment statute, together with other related measures, was enacted "to assure an effective program of child support." S. Rep. 1356, 93d Cong., 2d Sess. 2 (1974). The Senate report stated (*id.* at 42) that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents * * *. The Committee believes that all children have the right to receive support from their fathers. * * * [E]nforcement of child support obligation is not an area of jurisprudence of which this country can be proud."

Before the federal garnishment statute was enacted, there were two chief ways to enforce a child support or alimony award against a federal employee or serviceman (hereinafter "husband") living in another state. First, the non-employee spouse ("wife") could seek to enforce the award in the courts of the husband's state. This procedure was unsatisfactory for several reasons. It was costly for the wife to litigate in a distant state. The husband often had no assets to attach other than his federal salary, which could not be garnished. A delinquent husband, who might have moved in the first place to escape payment, could simply move again. And because states are constitutionally required to extend full faith and credit to support orders only if they are final under the law of the issuing state (*Sistare* v. *Sistare*, 218 U.S. 1 (1910)), it was often necessary for the wife

to bring repeated enforcement actions as installments became due.[13]

Because of these and other problems, the Uniform Reciprocal Enforcement of Support Act (URESA) (9 U.L.A. 643 (1979)) was promulgated in 1950. URESA or compatible legislation has now been adopted by every state.[14] Under URESA, the wife or children may file a complaint in their state of residence (§§ 13, 14). If the court finds that the complaint "sets forth facts from which it may be determined that the [husband] owes a duty of support," the court sends the complaint to the appropriate court in the husband's state (§ 17), where the local prosecutor represents the wife (§ 18) and seeks the issuance of a support order (§ 23).

This procedure also proved ineffective. The Senate committee that added the garnishment statute observed (S. Rep. 1356, 93d Cong., 2d Sess. 43 (1974)): "Thousands of unserved child support warrants pile up in many jurisdictions and often traffic cases have a higher priority." The committee noted (*id.* at 43-44) that the former wives and children of many affluent or middle-class fathers were forced to live on public assistance because of the lack of effective procedures for enforcing support awards, and

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[13] See Note, *Counterclaims and Defenses under the Uniform Recipriocal Enforcement of Support Act*, 15 Ga. L. Rev. 143, 144 (1980) (hereinafter cited as Note, *Counterclaims and Defenses*); Note, *Interstate Enforcement of Support Obligations through Long Arm Statutes and URESA*, 18 J. Family Law 537 (1979-1980).

[14] See Note, *Counterclaims and Defenses*, *supra*, at 145 n.11 (collecting statutes). New York, which has not adopted URESA, has a similar, compatible law (N.Y. Dom. Rel. Law §§ 30-43 (McKinney 1977)).

the committee listed as among the principal flaws in procedures then available "the statutory barrier to collecting from military personnel and Federal employees, and the low priority given child support investigations by the understaffed district attorneys offices" (*id.* at 44; see also 120 Cong. Rec. 40323-40324 (1974). During the House debates on the garnishment statute, Representative Ullman, the floor sponsor, made much the same point, stating (120 Cong. Rec. 41810 (1974): "[O]ur biggest problem in this whole area is that prosecutors fail to prosecute [under URESA] because they have more important things to do. We just simply have not even gotten a start on presenting these cases."

Congress also recognized the special problems posed by delinquent husbands who were federal or military retirees. A House report on a predecessor garnishment bill noted (H.R. Rep. 481, 92d Cong., 1st Sess. 17 (1971)) that suits to enforce retirees' support obligations were "frequently thwarted by a retiree pulling up stakes in the state in which he is being sued and moving to another state where legal action must be commenced again." Recommending the waiver of sovereign immunity for certain garnishment writs, the committee stated (*id.* at 18):

> We recognize this is a drastic departure from anything we have had in the past; but we believe it is wrong for the United States to protect retired and retainer pay while the military retiree can, for practical purposes, ignore court orders.
>
> * * * * *
>
> We recognize that the military retiree, because of the frequency of moves during the time spent on active duty, may have less roots in a particular community than his civilian counterpart.

b. The federal garnishment statute was designed to remedy many of these problems. It permits the garnishment of federal pay to enforce alimony and child support obligations "in like manner and to the same extent as if the United States or the District of Columbia were a private person" (42 U.S.C. (Supp. V) 659(a)). This enables wives to attach an asset that cannot easily be concealed, and it prevents husbands from evading payment by changing their residences. The government is not drawn into marital disputes and is spared undue administrative expense, because it is immune from liability for honoring "legal process regular on its face, if such payment is made in accordance with [the garnishment statute] and the regulations issued to carry out [that statute]" (42 U.S.C. (Supp. V) 659(f)). At the same time, the husband's rights are protected because he is promptly notified when the writ is served (42 U.S.C. (Supp. V) 659(d)) and may then take whatever steps are available to any other similarly situated garnishment defendant under the laws of the issuing state. See 120 Cong. Rec. 41810 (1974) (remarks of Rep. Ullman).

The court of appeals' decision thwarts this carefully crafted scheme and frustrates Congress's clear intent concerning the enforcement of the alimony and child support obligations of federal and military employees and retirees. It also creates an unmanageable burden for federal disbursing officers by forcing them to choose between ignoring state court orders or subjecting the government to monetary liability.

Under the decision below, the government may be liable for reimbursement if it honors a facially valid garnishment writ after having received "notice of a substantial claim of jurisdiction irregularity"

(App., *infra*, 17a). Indeed, the court reserved decision on the question whether notice of a mere "nonfrivolous claim" would not also suffice (*id.* at 17a, n.12). We have been informed that the salaries of more than 13,000 servicemen alone are now being garnished.

It is predictable that, as a result of the court of appeals' decision, a large number of the federal employees whose salaries are garnished will seek to avoid payment by providing disbursing officers with notice of claimed jurisdictional defects. Especially in cases involving servicemen, who are frequently transferred, asserting a colorable claim of lack of in personam jurisdiction will not be difficult. As Judge Nies noted in dissent (App., *infra*, 42a-43a), "[t]he majority's test of 'notice of substantial irregularity' means no more, on the basis of the facts here, than that an employee must tell his pay officer or supervisor that he was not domiciled in the state asserting jurisdiction over him."

Determining whether such claims are "substantial" or "nonfrivolous" is a task beyond the capabilities of federal disbursing offices. In the first place, there is no satisfactory way for disbursing officers to ascertain the relevant facts. If they rely on employees' allegations, employees will have little trouble establishing "substantial" claims. On the other hand, it is completely unreasonable to expect disbursing officers to engage in independent factfinding based on the state court record or the parties' submissions.

Even if the facts are undisputed, evaluating jurisdictional claims would be extremely time-consuming and would require considerable legal skill. Questions of in personam jurisdiction are often difficult, and cases involving servicemen are likely to explore the

outer reaches of the states' power in this regard. Moreover, the court of appeals' decision holds the government to an extremely high standard. The government may not safely rely upon a state court's determination that personal jurisdiction was present. Instead, the government must decide whether the state court erred, or at least whether a substantial or nonfrivolous claim of error has been asserted.

If the government honors a garnishment writ despite a claim of jurisdictional irregularity, it will risk having to pay twice in the event that the Claims Court decides the issue of in personam jurisdiction differently. Because of this risk, as well as the difficulty and uncertainty involved in determining whether a substantial claim of jurisdictional irregularity has been raised, federal disbursing officers in many cases will have little choice but to disobey state garnishment writs. This will lead to needless friction between the federal government and state courts (see App., *infra*, 25a, 47a-52a (Nies, J., dissenting)),[15]

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[15] The government's authority to refuse to comply with state garnishment writs is uncertain. Section 659(a) provides that the government is to be treated "in like manner and to the same extent as if the United States * * * were a private person." Post-judgment garnishment procedures frequently do not permit the defendant, let alone the garnishee, to attack the underlying judgment. Instead, the garnishee is merely called upon to answer whether he owes the defendant any money and, if so, the amount of indebtedness. See, *e.g.*, Ill. Ann. Stat. ch. 62, § 39(b) (Smith-Hurd 1972); Ohio Rev. Code Ann. § 2716.13(B); 2721.01(C) (Page supp. 1982). Under the Alabama statutes, the garnishee must answer whether he is or will be indebted to the defendant (Ala. Code §§ 6-6-393, 6-6-450 (1977)). "If the garnishee answers and admits indebtedness to the defendant, judgment thereon must be entered against him, after judgment against the defendant * * *" (*id.* at § 6-6-454). Thus, as Judge Nies ob-

and will force wives and children to whom alimony and child support payments are owed to rely upon the remedies that Congress found to be inadequate when it enacted the garnishment statute. See App., *infra*, 19a n.14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1983

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served (App., *infra*, 25a), "[t]he United States could no more 'refuse to honor' the writ summoning the Government to the Alabama court than it could 'refuse to honor' the summons by the Court of Claims."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 290-77

ALLAN WAYNE MORTON, APPELLEE

v.

THE UNITED STATES, APPELLANT

Decided: May 17, 1983

Before MILLER, SMITH, and NIES, *Circuit Judges.*

MILLER, *Circuit Judge.*

This appeal, in a case of first impression, is from a judgment[1] of the United States Claims Court based on its holding that Allan Wayne Morton was entitled to recover from the United States accrued amounts of money withheld from his compensation, as a Colonel in the United States Air Force, pursuant to writs of garnishment issued by the Circuit Court for the Tenth Judicial Circuit of Alabama. The case arises under Title 37, United States Code (relating to pay and allowances of the uniformed services), and the Fifth Amendment to the Constitution (prohibiting deprivation of property without due process of law). We affirm.

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[1] Entered October 8, 1982, pursuant to this court's order of October 4, 1982, and corresponding to the decision recommended by the trial judge in his opinion filed December 14, 1981.

BACKGROUND

Colonel Morton was born in Alabama in 1934 and lived there until he joined the Air Force in 1957 at the age of 23. In 1954, he married Patricia Kay Morton in Alabama, where their first son was born. The Mortons moved to Georgia in 1957; then to Ohio in 1960; to Georgia in 1961; to the Philippines in 1963; and to New York in 1965. A second son was born in 1960. Colonel Morton served in Vietnam from 1968 to 1969, during which time his family lived in Florida. In 1969, after returning from Vietnam, Colonel Morton and his wife bought a home in Virginia, where they lived until September of 1973, at which time they separated pursuant to a written separation agreement. (Colonel Morton had been notified in August of 1973 that his next military assignment would be in Alaska.)

Mrs. Morton and her two sons moved to Alabama on September 16, 1973. Household goods were moved to Alabama at that time using Colonel Morton's military household goods moving allowance. It was Colonel Morton's understanding that in order to use his moving allowance for this purpose it was necessary to file his income tax returns for 1973 in Alabama. Accordingly, Colonel and Mrs. Morton filed joint federal and state income tax returns in Alabama for 1973. They also filed a joint state income tax return in Virginia for 1973. For 1974, Mrs. Morton filed individual federal and Alabama income tax returns, refusing to file joint returns with Colonel Morton, who also filed separate returns in Alabama because he hoped to persuade Mrs. Morton to file joint returns with him in order to reduce their tax liability. (Such joint returns would, of course, supersede the previously filed individual returns.) Colonel Morton also filed a 1974 individual state income tax return in Virginia. His income tax returns for 1975 and thereafter were filed in Alaska.

The separation agreement provided, *inter alia*, that the Virginia home was to be the sole property of Colonel

Morton and that he was to make fixed monthly payments to Mrs. Morton for the support of the two children.

On June 1, 1974, Colonel Morton entered into a contract to purchase a permanent home for himself in Anchorage, Alaska. He intended to finance the purchase in part from the proceeds of the sale of the Virginia home. However, he was unable to consummate the Alaska purchase because, contrary to the provisions of the separation agreement, Mrs. Morton refused to sign the deed conveying the Virginia home. In a suit by Colonel Morton to obtain specific performance of the separation agreement, Mrs. Morton succeeded in having the agreement set aside.

Meanwhile, on August 28, 1974, Mrs. Morton filed suit in the Circuit Court for the Tenth Judicial District of Alabama for divorce, custody of the two children, support and maintenance for the children, and alimony. Colonel Morton received the suit papers by registered mail on September 17, 1974. Personal service was never effected. Colonel Morton contacted an attorney in the Judge Advocate General's office at Elmendorf Air Force Base in Alaska who advised him that service by mail was not sufficient to support a money judgment against him. Accordingly, Colonel Morton did not make an appearance in the Alabama suit. Judgment by default was entered against Colonel Morton on August 14, 1975. It granted Mrs. Morton a divorce and custody of the two children, and ordered Colonel Morton to pay Mrs. Morton $500 per month "as alimony . . . and partial support and maintenance of the . . . minor children."

On December 27, 1976, the Air Force Finance Office at Elmendorf received a writ of garnishment issued by the Register of the Alabama court which sought to garnish Colonel Morton's pay in the amount of $4100. After receiving notice of the writ, Colonel Morton again sought advice from an attorney in the Judge Advocate General's office. The attorney assured Colonel Morton that Mrs. Morton could not legally garnish his pay on the basis of the service of process by mail from the State of Alabama. Thereafter, on December 30, 1976, Colonel Morton pro-

tested to the Finance Office that he had paid all his obligations to Mrs. Morton,[2] that he was never properly served in the Alabama suit, that he was neither a resident nor a domiciliary of Alabama, and that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction.

Despite these protests, the Finance Office filed an answer to the writ on January 11, 1977, confessing indebtedness of $4100. That amount was subsequently deducted from Colonel Morton's pay and was paid to the clerk of the Alabama court. Other subsequent writs were similarly honored by the Finance Office.

On May 26, 1977, Colonel Morton filed this action to recover the amounts he alleges were wrongfully withheld from his military pay.

The Decision Below

The trial court concluded that Colonel Morton was neither a resident nor a domiciliary of Alabama, stating:

> When the plaintiff moved to Alaska in May 1974, it was his intention to purchase a home in Alaska and to establish a domicile in that State. He made his intention known at the time to associates.
>
> . . . .
>
> A change in domicile requires physical presence at the new location, plus an intention on the part of the individual to make the new location his or her home, and the absence of any intention to have a home at a former domicile. *Stamer v. United States*, 148 Ct. Cl. 482, 490 (1960); *cf. Holmes v. Sopuch*, 639 F.2d 431, 433 (8th Cir. 1981). When these elements concur, the change in domicile is in-

[2] At trial, Colonel Morton introduced evidence that, although the separation agreement had been set aside, he had continued to make support payments ($500 per month) to Mrs. Morton because he felt a moral obligation to do so; further, that at the time the writ was served, his oldest son was no longer a minor and was married.

stantaneous. *Spurgeon v. Mission State Bank*, 151 F.2d 702, 705-06 (8th Cir.), *cert. denied*, 327 U.S. 782 (1945).

With respect to the plaintiff, the essential elements for acquiring a new domicile concurred when the plaintiff arrived in Alaska during the month of May 1974. From then until 1977, the plaintiff was an actual resident of Alaska, it was his intention to make Alaska his home, and he lacked any intention to have a home at a former domicile. Accordingly, it necessarily follows that the plaintiff was a domiciliary of Alaska, and not of Alabama, during the 1974-75 period when the divorce proceeding against him in Alabama was in progress.

Next, considering the "minimum contacts" doctrine of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, the trial court concluded that—

it would offend "traditional notions of fair play, and substantial justice" if the plaintiff's contacts with Alabama prior to July 1957 were to be regarded as necessarily conferring jurisdiction on the Alabama courts to enter a money judgment against him some 18 years later, when the plaintiff was a domiciliary and actual resident of Alaska, was not served personally within the territorial limits of Alabama, and did not do anything to subject himself to the jurisdiction of the Alabama court.

The third and final question considered by the trial court was whether subsection (f) of the garnishment statute, 42 U.S.C. § 659, as amended by Pub. L. 95-30, § 501, 91 Stat. 157 (1977),[3] grants the Government im-

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[3] 42 U.S.C. § 659(a) allows the United States to be served with legal process for the enforcement of its employees' legal obligations to provide child support and alimony, thus:

United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon

munity from suit under the circumstances of this case. This subsection provides:

> Non-liability of United States, disbursing officers, and governmental entities with respect to payments
>
> Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

"Legal process" is defined in 42 U.S.C. § 662:

> Definitions
>
> For purposes of section 659 of this title—
>
> . . . .
>
> (e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which—
>
> (1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

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remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

The regulations issued to carry out 42 U.S.C. § 659 provide in pertinent part:

(f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, * * * which—

(1) Is issued by:

(i) *A court of competent jurisdiction*, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia * * *.

5 C.F.R. § 581.102(f) (1981) (emphasis supplied).

Regarding the question of whether the Government had made payment "pursuant to legal process regular on its face" and was, therefore, provided with immunity under 42 U.S.C. § 659(f), the trial judge concluded:

As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree on which they were based. *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909).

. . . .

As the Alabama court, in purporting to order Colonel Morton to make alimony and child support payments to Patricia Kay Morton, was not a "court of competent jurisdiction" because it had not acquired jurisdiction over the person of Colonel Morton, the void ancillary writs of garnishment which the Air

Force Finance Office honored in this case did not constitute the sort of "legal process" that would have insulated the Government against liability.

ANALYSIS

Immunity

As quoted above, 42 U.S.C. § 662 defines "legal process" to require that it be issued by a court of competent jurisdiction. There is no legislative history to guide us in interpreting the phrase "competent jurisdiction," but we may assume that Congress was aware that garnishment, a form of attachment, is merely an incident to a suit, and unless the suit can be maintained the garnishment must fail.[4] Accordingly, we conclude that process issued by a court in an ancillary garnishment proceeding against the Government does not satisfy the statutory and regulatory requirements if that court was not a court of competent jurisdiction over the underlying suit.

The point can also be made that where the judgment in the underlying suit is void, the "legal obligations" requirement of 42 U.S.C. § 659(a) is not satisfied. Similarly, Regulation 581.102(g) defines "legal obligation" to mean an obligation "which is *enforceable* under appropriate State or local law." (Emphasis added.) Obviously a void judgment would not meet this requirement.

With respect to whether 42 U.S.C. § 659(f) provides the Government with immunity from suit under the facts

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[4] *Big Vein Coal Co. v. Read*, 229 U.S. 31, 38 (1913); *Laborde v. Ubarri*, 214 U.S. 173 (1909); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624, 626 (8th Cir. 1944); *see also In re Stark*, 36 F.2d 280 (W.D.N.Y. 1929); *Olson v. Field Enterprises Educational Corp.*, 231 So. 2d 763, 765 (Ala. App. 1970) ("Garnishment is an ancillary proceeding, not an original civil suit.") What the dissent appears to say is that even if the Alabama court was not a court of competent jurisdiction over the underlying suit (in which event its judgment would be void), it was, nevertheless, a court of competent jurisdiction for purposes of the garnishment. Such a narrow reading of the phrase would elevate form over substance, to the deprivation of property without constitutional due process.

of this case, it must be determined whether "competent jurisdiction" in the statute (42 U.S.C. § 662(e)(1)) and regulations (5 C.F.R. § 581.102(f)) means only subject matter jurisdiction or both subject matter *and* personal jurisdiction; further, whether the immunity statute's provision that legal process be "regular on its face" permits the Government to escape liability notwithstanding notice of substantial questions over regularity. Colonel Morton argues that the Government is immune from suit only if payment is made by the United States "pursuant to legal process" and if that payment is made "in accordance with . . . the regulations issued to carry out [that] section." 42 U.S.C. § 659(f). He contends that, because "a court of competent jurisdiction" is one having both subject matter jurisdiction and personal jurisdiction, citing *Robinson v. Attapulgus Clay Co.*, 55 Ga. App. 141, 189 S.E. 555 (1937), and *State v. Long*, 44 Del. 251, 59 A.2d 545 (1948), *rev'd on other grounds*, 44 Del. 262, 65 A.2d 489 (1949), the Government cannot be immune from suit in this case unless the Alabama court had personal jurisdiction over him in the underlying suit for divorce, support, and alimony.

The Government objects to this interpretation, arguing that to so limit the Government's immunity would place an intolerable burden on the executive branch and would cause an administrative nightmare that Congress could never have intended. The Government further argues that case law uniformly interprets the statute to preclude looking into the validity of the underlying judgment so long as the writ of garnishment is "regular on its face."

However, the cases relied upon by the Government, beginning with *Popple v. United States*, 416 F. Supp. 1227 (W.D. N.Y. 1976), and including *Craft v. Craft*, No. 77-1205 (W.D. Okla. Feb. 16, 1979), involved the question of whether a federal district court had *subject matter* jurisdiction under 42 U.S.C. § 659 to entertain a challenge to a writ of garnishment issued pursuant to that statute. In *Overman v. United States*, 563 F.2d 1287 (8th Cir.

1977), the plaintiff's attempt to challenge garnishment of his salary was based on the allegation that the underlying Tennessee divorce decree had been obtained by fraud—not on lack of personal jurisdiction. In *Cunningham v. Dept. of Navy*, 455 F. Supp. 1370 (D. Conn. 1978), the plaintiff based his challenge to the garnishment of his disability retirement pension on the alleged unconstitutional application of the New York "long-arm" statute. In *Jizmerjian v. Dept. of Air Force*, 457 F. Supp. 820 (D. S.C. 1978), *aff'd mem.*, 607 F.2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), the court looked to the facial validity of the legal process (garnishment) and did not even mention, much less consider, the requirement in 42 U.S.C. § 662 that such process be issued by a court of competent jurisdiction. In *Calhoun v. United States*, 557 F.2d 401 (4th Cir.), *cert. denied*, 434 U.S. 966 (1977), the decision in the court's brief per curiam opinion, which noted the facial validity of the underlying divorce judgment, was issued June 21, 1977, after the effective date (June 1, 1977) of the amendments added by Pub. L. No. 95-30, 91 Stat. 159 (May 23, 1977), which included the requirement that legal process regular on its face must be issued by a court of competent jurisdiction. Since the case was argued February 16, 1977, it is apparent that the court did not consider the court of competent jurisdiction requirement, as we have.

We conclude that "competent jurisdiction" in the statute and regulations means both subject matter jurisdiction and personal jurisdiction. A court's jurisdiction normally encompasses both personal and subject matter jurisdiction, and we see nothing in the cases cited by the Government or in the legislative history suggesting otherwise when the Government's immunity is invoked. In a recent opinion, *Lugar v. Edmondson Oil Co., Inc.*, —— U.S. ——, 102 S. Ct. 2744, 2752 (1982), the Supreme Court makes it clear that constitutional requirements of due process have long been applied to garnishment procedures, citing *Sniadach v. Family Finance*

Corp., 395 U.S. 337 (1969), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Moreover, it has long been the rule that a court cannot adjudicate a personal claim, such as one for alimony or child support, without jurisdiction over the person. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957).[5] Alabama law cannot, under the label of "comity" or "indifference" override federal constitutional and statutory requirements.

Jurisdiction

The due process clause of the Fourteenth Amendment places a limitation on the circumstances in which a state may assert personal jurisdiction over a nonresident defendant. The seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) established what has since become known as the "minimum contacts" test for personal jurisdiction:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

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[5] The dissent finds no authority which imposes liability on a private employer (or other garnishee) for failure to undertake the defense of a supplemental garnishment proceeding by attacking the underlying judgment against the judgment-debtor. However, it appears to be well settled that a valid judgment against the defendant is essential to the validity of a judgment against the garnishee. 38 C.J.S. § 244 and cases cited. Also, recovery for wrongful garnishment has been allowed in suits brought by the defendants. 38 C.J.S. § 311 and cases cited. We note, particularly, the case of *Betts v. Coltes*, 467 F. Supp. 544 (D. Hawaii 1979), where the court made clear that monies erroneously paid over to a judgment creditor may be recovered, and a misuse of process or a failure to correct an erroneous garnishment could entitle an employee to damages from his employer.

The type of contacts necessary to satisfy the due process clause was explained by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Accordingly, the mere fact that Mrs. Morton and the two Morton children moved from Virginia to Alabama following the Mortons' separation in Virginia was insufficient to invest Alabama courts with personal jurisdiction over Colonel Morton in the underlying suit. Indeed, this very question was treated by the Supreme Court in *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

In that case, Mr. and Mrs. Kulko were married in California during a three-day stopover while Mr. Kulko was en route from Texas to a military tour of duty in Korea. Subsequently, the Kulkos moved to New York, where they lived until 1972. During that time, two children were born to them. In 1972, the Kulkos separated pursuant to an agreement drawn up in New York which, *inter alia*, provided for specified joint custody. Mrs. Kulko subsequently secured a Haitian divorce decree which incorporated the terms of the separation agreement, including a provision for child support payments while the children were with them mother. She thereafter moved to California, where she was joined by the two children, who had been living with their father. When she brought an action in California to establish the Haitian decree as a California judgment, to obtain full custody of the

children, and to increase Mr. Kulko's support obligations, Mr. Kulko entered a special appearance to contest jurisdiction on constitutional grounds. The Supreme Court held that Mr. Kulko's contacts with California were insufficient, as a matter of Fourteenth Amendment due process, to vest the courts of that state with personal jurisdiction over him.[6]

In determining whether, under the particular facts of the instant case, the "quality and nature" of Colonel Morton's contacts with Alabama enabled the Alabama state court to have personal jurisdiction over him,[7] domicile must be considered. It is well settled that in order to acquire a new domicile, a person must be present in the new location, intended to make that location his home, and have no intent to have a home at a former domicile. *Stamer v. United States*, 148 Ct. Cl. 482, 490 (1960). The Government contends that Colonel Morton's acts do not bear out the trial judge's findings that he had an intent to make a permanent home in Alaska and no intent to return to a former domicile. In particular, the Government points to the fact that Colonel Morton filed

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[6] The Court said that "the mere act of sending a child to California to live with her mother . . . connotes no intention to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 436 U.S. at 101. In like manner, Colonel Morton's contacts with Alabama from 1957 to 1973 were unrelated to state benefits. We are satisfied that he never resumed, or intended to resume, residence or domicile in Alabama and that he did intend to and did acquire such status in Alaska.

[7] We note that the due process clause of the Fourteenth Amendment does not serve as an independent basis for personal jurisdiction. Rather, "[t]he Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants," *Kulko v. California Superior Court*, 436 U.S. at 91, serving as a "constitutional limitation on state power." *Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977). *See also Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

income tax returns in Alabama in 1973 and 1974. However, the trial judge found that the reasons for filing in Alabama were connected with the Mortons' separation and the presence of Mrs. Morton in Alabama, and that such filing did not reflect Colonel Morton's intent to return to Alabama, to derive any benefit or protection from the laws of that state, or to not make Alaska his home. We are satisfied that the trial judge's findings are sufficiently supported by the record.[8] Thus, we conclude that Colonel Morton was domiciled in Alaska on August 28, 1974.[9]

Next, we regard as de minimis Colonel Morton's having once lived in Alabama more than 17 years before institution of the divorce suit. This conclusion is well supported by *Lightell v. Lightell*, 394 So.2d 41 (Ala. Civ. App. 1981), in which the court held that the lower court (Circuit Court, Montgomery County—Fifteenth Judiical Circuit) did not have in personam jurisdiction over the husband required to render a determination of paternity and a personal judgment for child support, alimony, attorney fees, and division of out-of-state property. The parties had separated while living in North Carolina, Thereafter, the wife moved to Alabama, and the husband traveled about pursuant to his career and currently resided in the Canal Zone. The wife sued for divorce and other relief, most of which was granted by

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[8] The Government also contends that statements in letters from Colonel Morton's attorney infer that Colonel Morton did not intend to remain in Alaska, and that Colonel Morton did not consider Alaska to be his domicile. These factors certainly have relevance in a domicile determination. However, considering all the facts in evidence, we conclude that the trial judge correctly determined that these contentions are not sufficiently persuasive to warrant "any change in the opinion . . . that the plaintiff was a domiciliary of Alaska, and not of Alabama, when the divorce proceeding against him in Alabama was in progress."

[9] It is also significant that, as related earlier, Mrs. Morton filed an affidavit declaring that Colonel Morton was, at the time of instigation of her suit, a "nonresident" of Alabama.

the lower court. Although upholding the lower court's granting of the divorce, the Alabama appellate court said, regarding the other relief:

> In the present case, to put it succinctly, the defendant has never conducted any activity in the State of Alabama. Nothing in the record would suggest that any basis for the exercise of in personam jurisdiction over him in Alabama would exist. . . . Plaintiff . . . asserts that Alabama's strong interest in protecting the welfare of the minor child provides the sufficient "minimum contact." While this interest is unquestionably important, it simply does not make Alabama a fair forum in which to require the husband, who derives no personal or commercial benefit from the child's presence in Alabama, and who lacks any other relevant contact with the state, to defend a paternity determination therein. *Kulko v. Superior Court of California*, . . . 436 U.S. at 100, 98 S.Ct. at 1701. The unilateral activity of the wife in moving to Alabama cannot satisfy the requirement of the husband's "minimum contacts" with the forum state. It is essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting activities in the forum state. *Hanson v. Denckla*, 357 U.S. 235 . . . .

Finally, using a quasi in rem theory, the Government attempts to justify jurisdiction on the basis that Colonel Morton's salary, upon which Mrs. Morton and the children relied for support, was present in Alabama or, at least, subject to the jurisdiction of Alabama. This fails for two reasons: First, the suit was brought against Colonel Morton—not against his salary, which was not located in Alabama under that state's law. *Louisville & N.R. Co. v. Nash*, 118 Ala. 477, 23 So. 825 (1898). Second, even if his salary were considered to be located in Alabama, this would not support jurisdiction in view

of the Supreme Court's admonition in *Shaffer v. Heitner*, 433 U.S. 186, 209, 212 (1977):

> [A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.
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> . . . .
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> . . . [A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. [Footnote omitted.]

See also State Tax on Foreign-Held Bonds, 82 U.S. 300, 320 (1872) ("All the property there can be . . . in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due.")[10]

Accordingly we conclude that Colonel Morton's contacts with the State of Alabama were too tenuous and insubstantial to support personal jurisdiction of the Alabama state court consistent with the "traditional notions of fair play and substantial justice" required to meet the test of due process under the Fourteenth Amendment to the Constitution. *International Shoe Co. v. Washington*, 326 U.S. at 316.

From the foregoing, it follows that the writs of garnishment issued by the Alabama state court were not issued by a "court of competent jurisdiction" as required by 42 U.S.C. § 662(e) and, therefore, did not constitute

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[10] This, of course, suggests a further reason for concluding that the Alabama court was not a court of competent jurisdiction, because it lacked jurisdiction over the Government's debt to Colonel Morton which it sought to garnish.

"legal process" for purposes of 42 U.S.C. § 659. To hold otherwise and to require (as would the dissent) Colonel Morton, a resident of Alaska, to proceed in the Alabama state court against Mrs. Morton would, in effect, render those statutes violative of constitutional due process, contrary to the principles that a court should construe legislative enactments to avoid constitutional difficulties if possible. *United States v. Clark*, 455 U.S. 23, 34 (1980); *United States v. Harriss*, 347 U.S. 612, 618 (1954); *Blasecki v. City of Durham*, 456 F.2d 87, 93 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972). This is particularly so where, as here, there is no legislative history of the statutes suggesting a contrary interpretation.

At the same time, we hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid.[11] but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.[12] That is the case here. The Department of the Air Force, through its Finance Office at Elmendorf, had information sufficient to give notice of apparent lack of personal jurisdiction in the Alabama court in the underlying suit. The record supplied to the Finance Office by Colonel Morton included an affidavit executed by Mrs. Morton upon instigation of her suit admitting that Colonel Morton was at that time a "nonresident" of Alabama. Also, the trial judge found that, unlike the situation in the *Calhoun* case, the State of Alabama had no "long-arm" statute at the time of fil-

[11] *Cf. Insurance Corp. v. Compagnie des Bauxites*, —— U.S. ——, 102 S. Ct. 2099, 2107 (1982).

[12] We need not decide whether a mere nonfrivolous claim would rebut the presumption that a process document has been issued by a court of competent jurisdiction.

ing of the suit by Mrs. Morton which enabled it to exert personal jurisdiction for alimony or child support over nonresidents solely by service of process by registered mail.[13]

The Finance Office disregarded the information showing jurisdictional irregularity in the underlying Alabama suit. This was exacerbated by the fact that Colonel Morton's position was based on advice from the Department's Judge Advocate's Office at Elmendorf. Our conclusion that the presumption, that a process document regular on its face is supported by a valid underlying judgment, is rebuttable places no greater burden on the Government in this case than that already assumed by it when, through the base Judge Advocate's Office, it responded to Colonel Morton's request with legal advice based on information sufficient to rebut the presumption that the judgment in the underlying suit was valid. We are not persuaded by the Government's argument that, were we to hold in Colonel Morton's favor, on the facts of this case, the result would be an administrative nightmare. (*See* second paragraph of note 14, *infra.*)

Accordingly, the Government is liable under the Fifth Amendment to the Constitution for monies wrongfully paid pursuant to the Alabama court's writs, said monies being those which had accrued to Colonel Morton under Title 37, United States Code.

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[13] **Trial Judge Finding of Fact No. 31:**

In 1974 and 1975, during the pendency of the divorce proceeding instituted by Patricia Kay Morton against Colonel Morton, the State of Alabama did not have a "long-arm" statute authorizing personal service on nonresidents for child custody, child support, or maintenance and support. At that time, the Alabama rule permitting substituted service was limited to the termination of the marital status, in the absence of the necessary "minimum contacts" required for the Alabama court to exercise personal jurisdiction over a nonresident defendant.

The judgment of the Claims Court is affirmed, and the cause is remanded for a determination of quantum.[14]

AFFIRMED

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[14] It should be pointed out that the Supreme Court, in *Kulko*, observed that both California and New York had adopted versions of the Uniform Reciprocal Enforcement of Support Act, which is designed to "facilitate the procurement and enforcement of child-support decrees where the dependent children reside in a State that cannot obtain personal jurisdiction over the defendant." 436 U.S. at 99. The Court reasoned that because "the Uniform Acts will facilitate both [Mrs. Kulko's] prosecution of a claim for additional support and collection of any support payments found to be owed by [Mr. Kulko] . . . it cannot here be concluded . . . that resident plaintiffs would be at a 'severe disadvantage' if *in personam* jurisdiction over out-of-state defendants were sometimes unavailable." *Id.* at 100 & n.15.

In this case, had the Air Force Finance Office refused to honor the writs of garnishment, Mrs. Morton's interests were similarly protected, because both Alabama and Alaska had adopted the Uniform Reciprocal Enforcement of Support Act. *Ala. Code* § 30-4-80 *et seq.* (1975); *Alaska Stat.* § 25.25.010 *et seq.* (1977). We note that all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have adopted the Uniform Reciprocal Enforcement of Support Act. Am. Jur. 2d Desk Book, Supp. 1982.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 290-77

ALLAN WAYNE MORTON, APPELLANT

v.

THE UNITED STATES, APPELLEE

NIES, *Circuit Judge*, dissenting.

I

I dissent. In summary, my reasons are:

1. *Colonel Morton has no unsatisfied claim for statutory pay.* Morton's claim has been discharged by payment to the Alabama court even if the underlying judgment were void or had been set aside. An employee has no claim against his employer for failing to litigate the validity of a pre-existing judgment on which garnishment is based.

2. *The United States has specifically reserved its immunity from suit* (whether viewed as a statutory claim, a violation of fiduciary duty, a suit for wrongful garnishment, or an action based on abuse of administrative discretion). The majority, in effect, interprets the statutory reservation of sovereign immunity to impose liability.

3. *Absence of binding judgment on affected parties.* The judgment of the Claims Court must be vacated because of the absence of indispensable parties, namely, the dependents of Colonel Morton who benefited by the garnishment.

4. *Principles of comity and federalism require that Colonel Morton seek relief in the Alabama courts.* The majority's holding that the underlying Alabama judgment against Colonel Morton is void violates these principles.

5. *The exercise of jurisdiction by the Alabama Court over Colonel Morton in 1974 does not offend concepts of due process.* Colonel Morton was purposely availing himself of the privileges of the state of Alabama at that time in the conduct of his personal affiairs.

I base these conclusions on the following key factors. First, the facial validity of the writs served on the Government, as well as the judgment for alimony and child support which accompanied the garnishment process, is unquestioned and unquestionable. Second, Morton does not dispute that he received actual notice of the divorce decree, the writs, and the Government's answers. Third, the judgment for alimony and child support, while based on a default, was entered only after a hearing before the Alabama court and open court testimony by Mrs. Morton. The court was aware that Colonel Morton was a nonresident of Alabama and, nevertheless, found it had jurisdiction over him to enter the monetary judgment.

Finally, but most importantly, the legislative history of the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133), shows that the purpose in allowing garnishment, which came into being by that statute, was to aid the states and federal Government in reducing public aid to dependent children. Garnishment of federal wages is allowed only for support payments of dependents. The majority entirely frustrates this purpose.

II

Morton's pay claim has been discharged

The fundamental error which pervades the majority opinion is its unquestioning acceptance of the premise

that a private employer would remain liable to an employee for wages under the circumstances here. Thus, the majority finds it necessary to discuss only the issue of sovereign immunity. Since a private employer would not be liable under similar circumstances, consideration of sovereign immunity would be unnecessary except that, if there is immunity, a fundamental question of the court's jurisdiction is raised.

It has been the position of Morton throughout these proceedings that, regardless of facial validity, where garnishment proceedings are based on a void judgment, payment by the garnishee is, ipso facto, illegal, so that the garnishee remains liable on his debt to the judgment-debtor. This legal premise is erroneous, but it is the basis for liability adopted by the trial court and purportedly by the majority.[1] As stated in the trial judge's opinion (Slip Op. at 21-22):

> The writs of garnishment involved in the present case were issued as incidents to the decree of the Alabama court. As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree of which they were based. *Laborde* v. *Ubarri*, 214 U.S. 173, 174 (1909).
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> For the reasons previously outlined, it is concluded that the Air Force Finance Office acted arbitrarily and illegally when it ignored the plaintiff's protest that the Alabama court did not have jurisdiction to enter a money judgment against him for alimony and child support, made deductions from plaintiff's pay, and paid the money over to the Cir-

[1] After many readings of the majority opinion, I can only conclude that the majority's theory of liability sounds in tort rather than being based on a statutory pay claim, i.e., on a debt.

cuit Court for the Tenth Judicial Circuit of Alabama pursuant to writs of garnishment that were void because they were ancillary to a court decree which was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton.

Morton's argument begins with an analysis of divorce law [2] leading to the conclusion that a court must have personal jurisdiction over the defendant in a divorce action to enter a monetary judgment. No one takes issue with this premise. Then, he correctly states that garnishment proceedings are ancillary to the principal action. Thus, if the original judgment is held to be void, the ancillary writ of garnishment also falls. *Laborde* v. *Ubarri*, 214 U.S. 173 (1909); *Wilkinson* v. *Cohen*, 257 Ala. 16, 57 So.2d 108 (1952). This precedent does not establish that a *garnishee* remains liable because execution was obtained against him on a void judgment. No such precedent exists. Rather, the cited precedent establishes that if the underlying judgment is set aside, the *judgment-creditor* must return the property he obtained by garnishment. Thus, the cases deal with the rights of Colonel Morton against Mrs. Morton, not against the United States.

Similarly, no precedent relevant to this case can be derived from prejudgment garnishment cases on which

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[2] This case was previously before the United States Court of Claims on cross motions for summary judgment, which were denied without prejudice. The court did not make any determination, legal or factual, on any issue, inasmuch as it found the record inadequate. The issue of liability of an ordinary garnishee was raised in the briefs on the motions for summary judgment, and the arguments previously advanced by Morton have been taken into account. The issue of immunity came into this case only after enactment of 42 U.S.C. § 659(f). Because the issue of liability has never been fully briefed by the Government and because I find this issue in itself dispositive, it has been developed here. Also the immunity provision cannot be interpreted properly, in my view, without full appreciation of the issue of liability.

Morton and the majority rely. (*See* n.4, *infra.*) The United States was in no way responsible for the underlying judgment against Colonel Morton. Indeed, the general principles to be applied here are more appropriately found in the Law of Judgments. In any event, since garnishment is a creation of state statutory law, in determining whether the United States as a garnisheed employer has fulfilled its obligations, we first must look to state law for guidance and in particular to the law of Alabama.

In establishing garnishment procedures, the various states can impose whatever duties their citizens find appropriate on a garnishee, and by waiver of immunity the United States has made itself subject to these state laws like an ordinary employer. The obligations imposed by a state on a garnishee must, of course, take into account the due process rights of a garnishee which are as important as the due process rights of a judgment-debtor. The majority, without any analysis of the Alabama statute, finds a duty on an employer served with garnishment to carry the burden of litigation for his employee on penalty of double liability. Such an obligation would clearly violate the due process rights of a garnishee. The employer/garnishee has no interest in the litigation, being merely a stakeholder, and cannot be made to shoulder the burden and expense of litigation for someone else. Indeed, I believe the concept of imposing a duty to litigate the underlying judgment would be unthinkable, except for the fact that the employer here is the Government. However, the relationship between the Government and Colonel Morton in garnishment proceedings is in no way unique. It should at least give the majority pause that out of the thousands and thousands of garnishment proceedings against employers each month, not one case can be cited where an employer was held liable to this employee because the underlying judgment was void or because the employer failed to litigate the issue of its validity for his employee. Anyone who

has ever dealt with garnishment involving private employees would be aware that employees routinely tell their employers, when informed of garnishment, that the judgment was satisfied, that they were not served, or that they will sue if they do not get their wages, just as Colonel Morton did here. Such statements do not affect a private employer's duty or liability. Employers must pay according to the court's direction, assuming the *employer* is subject to the court's jurisdiction. It is hornbook law in garnishment proceedings throughout the states that the employee has the obligation to challenge the garnishor before the court which allowed garnishment. *Calhoun* v. *United States*, 557 F.2d 401 (4th Cir.) (*per curiam*), *cert. denied*, 434 U.S. 966 (1977).

Under Alabama law, nothing could be clearer than that Morton would have no claim against a private employer merely because the underlying judgment is void. Upon proper service of a writ on an employer, the employer has no option but to answer, stating the amount of indebtedness to its employee. The majority suggests the Government should have "refused to honor" the writ. No private employer has that right, and under 42 U.S.C. § 659(a) (1976 & Supp. IV 1980) the Government is treated "in like manner and to the same extent as if the United States . . . were a private person." The United States could no more "refuse to honor" the writ summoning the Government to the Alabama court than it could "refuse to honor" the summons by the Court of Claims. The United States had to answer, and in its answer had to state whether or not it owed money to Colonel Morton. Ala. Code §§ 6-6-393 and 6-6-450 (1975).[3] Once an employer's answer admits the amount

[3] The Alabama code applicable when garnishment was had in 1977-78 is found in Ala. Code § 6-6-370 *et seq.* (1975) (Article 9). All references are to the 1975 Compilation of the Alabama Code unless indicated otherwise. Pertinent sections are set forth in the appendix. Contrary to n. 10, *ante*, wages payable outside the state are subject to garnishment if the employer does business in the state. *Orrox Corp.* v. *Orr*, 364 So.2d 1170 (Ala. 1978).

of garnishable indebtedness, or if the employer fails to answer, a judgment *must* be entered against the employer in favor of the garnishor (i.e., Mrs. Morton). *Id.* §§ 6-6-454 and 6-6-457. Where the garnishment is on an existing judgment, an employee may post bond to stop the garnishment. *Id.* § 6-6-430(a). Where no bond is given and the garnisheed employer pays to the court, § 6-6-453(a) provides: "Such payment has the effect to discharge the garnishee from liability for the amount so paid . . . ."

As further protection of the garnishee from the debtor, (*i.e.*, the United States from Colonel Morton), the statute provides in § 6-6-461:

> The judgment condemning the debt, money or effects to the satisfaction of the plaintiff's [Mrs. Morton's] demand is conclusive as between the garnishee [the United States] and the defendant [Colonel Morton] to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment, which he may do in his own name; and, if such judgment is stayed by bond and the garnishee is notified of the fact, he is not permitted to discharge such judgment pending appeal.

No Alabama case law construes the protection given the garnishee from a subsequent action by the judgment-debtor as in any way conditional on the actual validity of the underlying judgment. As early as 1878, the Supreme Court of Alabama held in *Montgomery Gas Light Co.* v. *Merrick & Sons*, 61 Ala. 534 (1878):

> Since the garnishee stands in relation of indifference between the plaintiff and the defendant, the court will protect him against the jeopardy of a double satisfaction, if an action is commenced against him by the defendant.

In construing a Georgia statute paralleling that of Alabama, Judge O'Kelley, in *West* v. *West*, 402 F. Supp.

1189 (N.D. Ga. 1975), provided the following perceptive analysis of the role and liability of an employer (in that case also the federal Government) who becomes involved in garnishment proceedings:

> Under Georgia law, when a garnishee answers the summons of garnishment, the statements in the answer are accepted as true, and the garnishee is discharged from all further liability unless either the claimant or the defendant files a traverse contesting the answer. Ga. Code Ann. § 46-303 (Rev. 1974); *Peaslee-Gaulbert Corp.* v. *Okarma*, 97 Ga. App. 809, 104 S.E.2d 548 (1958).
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> If the fact and amount of the government's debt to the defendant is not challenged, the garnishee has no further liability and is no longer interested in the litigation.

Id. at 1191-92. *See also Garrett* v. *Hoffman*, 441 F. Supp. 1151, 1157 (E.D. Pa. 1977) ("[A] Florida writ, once served on the Federal defendants, rendered them liable for [garnishor/wife] for plaintiff's accrued retirement pay for the month in question.").

The majority does not make any analysis of Alabama law or of a private employer's liability except to indicate in a footnote (n. 5, *ante*) that liability is "well-settled," referring the reader to 38 C.J.S. *Garnishment* §§ 244, 231 (1955) and cases cited therein.[4] However, the authority

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[4] In looking for precedent in garnishment proceedings, as previously indicated, one must distinguish between cases where the underlying judgment was obtained prior to the garnishee's involvement and those where the presence of the garnishee, or the "res" he holds, provides the jurisdictional basis for the judgment against the person whose property is garnished. Greater duties may have been imposed in pre-judgment garnishment, but after recent decisions of the U.S. Supreme Court these cases have little, if any, continued validity, in any event. *See* Note, *Garnishment in Alabama*, 29 Ala. L. Rev. 649, 661-67 (1978), for a discussion of the effect of these decisions on Alabama law. *Cole* v. *Randall Park Holding Co.*, 201

cited, upon examination, fails to provide any support for the summary disposition of this issue by the majority. Indeed, the only attempts by an employee to subject an employer to double liability, by reason of failing to make a collateral attack on the underlying judgment, have been against the Government and in all cases, except this one, such attempts have received short shrift.

The Fourth Circuit in the landmark case directly on point, *Calhoun* v. *United States*, *supra*, which was fully briefed up to the Supreme Court, reached a conclusion directly contrary to the majority. The pertinent facts on the issue of liability in *Calhoun* are indistinguishable from the facts at hand.[5] An officer sued for his statutory pay under the Tucker Act.[6] Commander Calhoun had received service by mail in Virginia relating to California divorce proceedings after his wife abandoned him and moved to California. Commander Calhoun did not answer or appear in the proceedings. His wife was granted a

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Md. 616, 95 A.2d 273 (1953), and *Egnatik* v. *Riverview State Bank of Kansas City*, 114 Kan. 105, 216 P. 1100 (1923), cited by appellant, and the cases at 38 C.J.S. *Garnishment* § 244 (1955), are cases of this nature and have no applicability to garnishment in aid of execution on a pre-existing judgment. Here the United States was in no way responsible for the judgment of alimony and child support against Colonel Morton, and, indeed, was not subject to garnishment suits at the time the suit was begun. *See Garrett* v. *Hoffman*, 441 F. Supp. 1151, 1158 (E.D. Pa. 1977), which discusses this difference in connection with garnishment of federal wages. The majority also cites 38 C.J.S. *Garnishment* § 311 (1955) and dictum in *Betts* v. *Coltes*, 467 F. Supp. 544 (D. Hawaii 1979), concerning actions for wrongful garnishment, tort cases not within the jurisdiction of the trial forum here, and/or excessive garnishment, not relevant here.

[5] On the issue of *in personam* jurisdiction, the facts detailed in the trial court and appellate opinions show that Commander Calhoun had no connection with California, unlike Colonel Morton with Alabama.

[6] The jurisdiction of the district courts was identical at that time with the former United States Court of Claims except for amount in such cases. 28 U.S.C. § 1346(a)(2) (1976).

divorce and an award of alimony and child support. Mrs. Calhoun applied to the California court for a writ of garnishment on that judgment. Commander Calhoun received notice of garnishment from the court and from the Navy Family Allowance Activity. His attorney informed the Navy that the California court had no *in personam* jurisdiction over Commander Calhoun when it entered the support decree, since he was not resident, domiciled, served with process or otherwise engaged in activities in California. Like Morton, he asserted that the Government was obligated to attack the California decree. All of the arguments advanced by Colonel Morton were advanced by Commander Calhoun. In a *per curiam* opinion of Chief Judge Haynsworth and Judges Butzner and Russell, the court affirmed the grant of summary judgment to the Government, applying the same law to the Government as that applicable to a private employer:

> It is clear that the employer, on receipt of the garnishment notice, must give notice to its employee that it has been served so that the employee has the opportunity to defend himself. *See Harris* v. *Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1904). The employer has a greater obligation only where the underlying judgment is void on its face.
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> In this case, the divorce judgment is facially valid. Service by mail was had in accordance with the California Code of Civil Procedure § 415.20. The asserted invalidity is the California court's lack of *in personam* jurisdiction over Calhoun. The question as to *in personam* jurisdiction will probably be whether Calhoun was a domiciliary resident or citizen of California. Calhoun is assuredly in a better position to effectively litigate that issue than is the United States. ***The United States was under no duty to contest the judgment, exposing itself to potential double liabilities.*** It was Calhoun's obligation to

attack the judgment if he wished to avoid the deduction from his pay.

557 F.2d at 402 (emphasis added).

The majority attempts to distinguish *Calhoun* from the case at hand by reliance on the finding of the trial judge here that Alabama had no "long-arm" *statute* comparable to that of California. (n. 13, *ante.*) Not only is absence of a statute immaterial in view of the judicially established law in Alabama,[7] but also the existence of a long-arm statute does not change the issue of whether Calhoun and Morton could be subject, as a matter of due process, to the jurisdiction of the respective courts. *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978).

The *Calhoun* court did not exonerate the United States because the underlying judgment was not void, but because, in its view, it was not incumbent on an employer

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[7] Contrary to the majority view, a long-arm statute is not necessary to confer jurisdiction on the Alabama state court. Such jurisdiction may be exercised unless *restricted* by a long-arm statute or other jurisdictional limitation. The Alabama Supreme Court in *New York Times* v. *Sullivan*, 273 Ala. 656, 144 So.2d 25, 34 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964), had declared that Alabama jurisdiction extended to the full extent allowed by due process and permitted service by mail on non-residents. *See also Ex parte Martin*, 281 Ala. 135, 199 So.2d 836 (1967). Rule 4.2 was adopted by the Alabama Supreme Court to clarify the former Rule 4 of the Alabama Code of Civil Procedure (effective July 3, 1973, and published at 290 Ala. 373 (1973)). The new rules, while making explicit that Alabama asserts "long-arm" jurisdiction as far as due process will allow, does not represent any expansion of the jurisdiction of Alabama courts over what it was at the time Mrs. Morton filed her complaint against Colonel Morton. Code of Alabama, Tit. 13, § 17(a) (1971) (1973 Cum. Supp.). *See generally*, "Committee Comments on Proposed Amendments to the Alabama Code of Civil Procedure," 37 Alabama Lawyer 84 (April 1976).

The majority states there was no "personal service" on Colonel Morton, using the term in the narrow sense of delivery of a summons to him personally within the state. He was properly served by mail pursuant to the court's direction if he was subject to the court's jurisdiction. There is no challenge to the adequacy of the notice he actually received of all proceedings.

to look behind the *facial* validity of the garnishment process. The Fourth Circuit refused to undertake the ill-advised plunge into the facts taken by the majority here. It relied on the *statement* of the California court that it had jurisdiction. The Alabama divorce decree which was served on the United States with the writ in issue here begins with the equivalent *statement*: "It appearing in this cause that the Defendant was duly served and failed to appear . . . ."

It must be emphasized that the *Calhoun* court was addressing only the issue of liability. While garnishment of federal wages came into being in 1975, the immunity provision and the definitions in 42 U.S.C. § 662 relating thereto, discussed *infra*, were not enacted until 1977 and were not at issue in *Calhoun*. Thus, without the immunity provision, the *Calhoun* court found no liability. The majority's treatment of *Calhoun* in its discussion of immunity illustrates the confusion which I find throughout the opinion between immunity and liability.

Relief from Void Judgments

The majority puts forth no basis for liability other than that a garnisheed employer would remain liable to an employee for paying a void judgment against his employee. Void to the majority means void for all purposes and with respect to all persons. This conclusion is not only in error as a matter of garnishment law but also contravenes accepted principles of the effect which must be given to void judgments, particularly where the rights of third parties would be adversely affected. To avoid belaboring this point, I will only call attention to the American Law Institute's recently published Restatement (Second) of Judgments (1982), which contains lucid explanations throughout the two volumes why the majority's simplistic view is in error. Of particular interest is § 16 Comment *c* (pp. 146-47 of Vol. 1), which analyzes the problem of a judgment based on a void judgment as follows:

As stated in Comment *a* above, the problem when met head-on is that of a judgment based and dependent upon an earlier judgment which is subsequently nullified. It has been contended that the later judgment should then be automatically nullified. The current doctrine, however, is that the later judgment remains valid, but a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.

If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like, or is still open to appeal, or such a motion has actually been made and is pending or an appeal has been taken and remains undecided, a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequence elimination of the basis for the later judgment. The court should then normally set aside the later judgment. When the later judgment is no longer open to a motion for a new trial or the like at the trial court level, nor subject to appeal, the fact of the nullification of the earlier judgment may be made the ground for appropriate proceedings for relief from the later judgment with any suitable provision for restitution of benefits that may have been obtained under that judgment.

It must be borne in mind that relief from any judgment is based on equitable principles and that restitution can be obtained only from one who benefited by the judgment. This is the thrust of the decision of the Supreme Court in *Laborde* v. *Ubarri*, *supra* (attachor required to return property). Similarly, in a recent decision, *Harris* v. *National Bank & Trust Co.*, 406 So.2d 968 (Ala. Civ. App. 1981), where a writ of garnishment was void, an employee was held to be entitled to return of her garnisheed wages from the person (garnishor or employer) *who was holding them.* Thus, if Colonel Morton is entitled to relief from the Alabama judgments, the

proper defendant is his wife, not the United States. *Tinnin* v. *Tinnin*, 391 So.2d 1047 (Ala. Civ. App. 1980).

Conclusion on Liability

The trial court erred as a matter of law in finding the United States liable under the precedent of *Laborde* v. *Ubarri*, *supra*. The majority similarly assumes liability, if there is no immunity.[8] I would hold for the Government on the issue of liability.

III

Interpretation of 42 U.S.C. § 659(f)

The majority wholly ignores the interpretation of the subject statute given by the Comptroller General of the United States and more than eight years of established administrative practice. Indeed, the majority appears unaware that the current garnishment regulations of the Office of Personnel Management, 5 C.F.R. § 581.101 *et seq.* (1981) (which are basic to the regulations of all agencies), are void if the majority opinion stands. Moreover, these regulations were entirely in accordance with the decisions of all other federal courts which had interpreted the statute and the obligations of the Government as a garnishee before this court's decision. In view of the plenary appellate jurisdiction of this court over these cases, *see* 28 U.S.C. §§ 1295(a)(2) and (3), regulations

[8] The majority has laced its opinion with constitutional overtones. In connection with a claim to statutory pay, this adds nothing to Morton's claim. *Testan* v. *United States*, 424 U.S. 392 (1976). Morton's due process rights were, in any event, fully protected by his right to defend the garnishment proceeding, as he had a right to do under Alabama law, as a party. *Harris* v. *National Bank & Trust Co.*, 406 So.2d 968 (Ala. Civ. App. 1981). Despite at least three opportunities (three to five writs have been served), Morton wholly failed to avail himself of state procedures which would have protected him from wrongful garnishment. The majority's solicitude for his due process rights appears misplaced. By choice, he purposefully ignored the safeguards available to him.

of all federal agencies must be made to conform to the majority decision, which in my view is equally in error on the issue of immunity as on liability.

Sovereign immunity is deemed waived by the various statutes under which persons employed by the Government are entitled to pay. 42 U.S.C. § 659, enacted in 1975, waives sovereign immunity to allow garnishment of federal wages for the limited purpose of family support. After a flurry of litigation against the Government regarding garnishment, in 1977 the garnishment statute was amended (Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501, 91 Stat. 126, 157 (1977)) specifically to reassert sovereign immunity with respect to claims of employees whose wages had been garnished. Any pay claim is, thus, limited by the final paragraph of 42 U.S.C. § 659:[9]

> (f) Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

This immunity provision, in fact, parallels generally the scope of a garnishee's liability as defined by the Alabama courts and in *Calhoun*. The immunity provision has the effect of a limitation or prohibition against imposition of greater duties on the Government by any state and, thus, is an aid to administration in that garnishment from all states can be treated uniformly. Since 42 U.S.C. 659(f) by its terms is satisfied here, Morton's claim should be dismissed for lack of jurisdiction. The majority, however, finds no immunity by interpreting the reserva-

[9] While the section is entitled "Non-liability," it is considered by the parties and the majority as a reservation of immunity, and for purposes here, I will also treat it as an immunity statute. The statute could also be treated as an affirmative defense to a pay claim.

tion of immunity narrowly and by the addition of qualifying phrases, contrary to repeated instruction of the Supreme Court that consent must be "unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

The majority first construes the immunity statute to require that the court which issued the underlying judgment must have jurisdiction over the subject matter and *in personam* jurisdiction over the employee. Only then, in the majority view, is the court a "court of competent jurisdiction" within the meaning of 42 U.S.C. § 662 (Supp. IV 1980), the section in which "legal process" is defined. By finding that the Alabama court had no jurisdiction over Morton, the Alabama court could not issue "legal process" ["[T]he writs . . . did not constitute legal process for purposes of 42 U.S.C. § 659," *ante* at 20]. Thus, it would seem unnecessary to read further into 42 U.S.C. § 659 to say there is *no* sovereign immunity, and in fact, the majority's analysis entitled "Immunity" ends at this point.[10]

The majority at the end of its opinion then appears to have second thoughts about the absolutism of its holding on immunity and steps back to modify its position, concluding:

> At the same time, we hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid. . . .

Ante, at 20-21.

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[10] The majority similarly relies on the necessity for a "legal obligation" in 42 U.S.C. § 659(a) (1976 & Supp. IV 1980). Apparently the majority rejects the view of Congress that "all children have the right to receive support from their fathers." S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133, 8146.

Since all process served here is regular on its face and the Government would be exculpated, the majority has to turn again, and adds:

> [B]ut that such presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.

Ante, at 21. In effect, the majority accepts the immunity statute as written but adds its own proviso.

What the majority is, in fact, doing is construing the immunity statute to impose liability on a theory of negligence or breach of fiduciary duty. Indeed, its entire two factor analysis of "court of competent jurisdiction" is simply irrelevant to its own conclusion. The majority adopts no absolute requirement for either subject matter or personal jurisdiction. In my view, to be a "court of competent jurisdiction" the court must have subject matter jurisdiction.

Since the majority is basing the allowance of Morton's claim on the conduct of the Air Force and Morton, it is appropriate to look at what steps the Government took and what "notice" Morton gave the Government.

To begin with, when Colonel Morton sought advice in 1975 concerning the judgment awarding alimony and child support to Mrs. Morton, the Air Force advised him that a court entering a monetary decree had to have personal jurisdiction over him. That advice was correct. Personal jurisdiction does not, of course, require personal service, in the sense of service on Colonel Morton in Alabama. Service by mail, as authorized by the Alabama court here, is sufficient for the exercise of personal jurisdiction if Colonel Morton had sufficient contacts with Alabama.

With respect to the subsequent writs of garnishment, Morton does not challenge the facts set forth in the following affidavit:

State of Colorado)
)
City and County of Denver)

AFFIDAVIT

James R. Russell, Affiant, being first duly sworn, upon oath deposes and states as follows:

1. Affiant is a civilian Attorney-Advisor assigned to the Office of the Staff Judge Advocate, Air Force Accounting and Finance Center, Denver CO 80279. Affiant's duties principally involve legal review of State garnishment and similar processes served on the United States Air Force pursuant to 42 U.S.C. 659.

2. On 27 December 1976, the United States Air Force was served by certified mail with a Writ of Garnishment seeking to garnish the pay of Col Allan W. Morton. When the Writ of Garnishment was submitted to AFAFC/JA for legal review, it was randomly assigned to Affiant. In legal review, Affiant observed:

a. The Writ of Garnishment served was the "regular" form used in the State of Alabama. It was issued by the Register of the Tenth Judicial Circuit Court. (Attachment 1.)

b. The Writ of Garnishment recited a decree entered in the cause dated 14 August 1975.

c. The Writ recited on its face that it sought "alimony and child support" in the amount of $4,100.00.

d. The Writ was accompanied by an Affidavit executed by Patricia K. Morton which recited the Judgment dated 14 August 1975 and that $4,100.00 was due and owing for alimony and child support. (Attachment 2.)

e. The Writ was accompanied by a copy of a "Final Judgment of Divorce". In paragraph 5, such

Judgment demonstrated that $500.00 per month was made against Allan W. Morton "as alimony for plaintiff and partial support and maintenance of the said minor children". The Judgment recited in its first line, "It appearing of record in this cause that the defendant was duly served and failed to appear . . .". (Attachment 3.)

3. Based upon the observation in paragraph 2 hereof, Affiant determined that the Writ of Garnishment was issued under the authority of the Circuit Court and such had proper subject matter jurisdiction; that the collection was for child support and alimony and was therefore within the "waiver of sovereign immunity" imparted by 42 U.S.C. 659; that such Writ was issued upon Affidavit and was based upon a Final Judgment of Divorce which included an alimony and child support award; and that the Final Judgment of Divorce recited, "defendant was duly served", and did not by its face raise personal jurisdiction questions. The Writ of Garnishment was determined to be legally sufficient to the extent of $4,100.00. At such time, the position of the United States Air Force was that "costs" were not within the scope of the waiver of sovereign immunity.

4. On or about 30 December 1976, Mr. Johnny Nieto, AFAFC/JA, then the senior attorney assigned to garnishment duties and Affiant's supervisor, received a telephone call from Col Morton essentially alleging that the Alabama garnishment was invalid as no personal service of process was made. Mr. Nieto referred the information to Affiant and, on or about 30 December 1976, Affiant "stayed" compliance with the Writ pending receipt of documentation which Col Morton had indicated he would send.

5. On or about 10 January 1977, Affiant received a call from Col Morton, the nature of which was to

advise that he was going to sue Affiant personally. In this conversation, Col Morton advised Affiant he had received service of process in the Alabama divorce proceeding by registered mail.

6. By letter dated 30 December 1976, Col Morton presented arguments that he had paid the obligation; that he was never served or notified of the proceeding; and that he was neither domiciled or a resident of Alabama. (Attachment 4.) In support of his arguments, Col Morton attached copies of five letters. (Attachment 5.) The letters were essentially the opinion of his legal counsel as to the validity of the Alabama divorce. The letters contained nothing that had any bearing on the recitation in the Judgment that "defendant was duly served". *Further, the letters demonstrated that Col Morton was a domiciliary of the State of Alabama who was advised by counsel on 18 August 1976 to change his legal place of residence.* [Emphasis added.]

7. On 11 January 1977, an Answer was filed in the Alabama Court confessing indebtedness of $4,100.00 and such amount was subsequently paid to the Clerk of the Circuit Court. (Attachment 6.) Col Morton was advised by letter dated 14 January 1977 that the Alabama process was regular and valid on its face and would be honored. (Attachment 7.)

8. By telephone conversation 31 January 1977, Kaletah Carroll, plaintiff's counsel herein, advised Affiant of her opinion of Alabama law and stated that no personal service of process had been made. By letter dated 29 March 1977, Kaletah Carroll provided documentation affirmatively demonstrating that Col Morton was served in the Alabama divorce proceeding by registered "return receipt requested" mail. (Attachment 8.)

9. On 2 May 1977, the United States Air Force was served with a second writ of Garnishment seeking

$1,750.00. (Attachment 9.) A Motion for Enlargement of Time of [sic] Answer was filed due to the enactment of Pub. L. 95-30 (23 May 1977). (Attachment 10.) Since Affiant was under threat of personal suit, the question of validity of service of process by registered mail was posed to the U.S. Attorney in Birmingham AL by letter dated 1 June 1977. (Attachment 11.) The U.S. Attorney advised that such service was sufficient pursuant to Rule 4.2, Alabama Rules of Civil Procedure. (Attachment 12.) An Answer to such Writ is due 6 July 1977 and such process has been determined legally sufficient and such answer was filed 30 June 1977 (Attachment 13); however, amounts due thereunder have not been paid as of present to the Clerk of the Court.

10. Attachments referred to herein are by this reference incorporated herein.

FURTHER, Affiant saith not.

/s/ James R. Russell
JAMES R. RUSSELL
Affiant

Subscribed and sworn to before me by James R. Russell this 30th day of June, 1977.

/s/ Patricia A. Stichter
PATRICIA A. STICHTER
Notary Public

My Commission expires 21 June, 1980.

The affidavit is confirmed by Mr. Russell's letter of January 14, 1977, to Colonel Morton which states:

To begin, Public Law 93-647, codified at 42 U.S.C. § 659 enters the consent of the United States to

garnishment and similar processes of the states. No federal law of garnishment was created, and consequently, all questions of law are resolved by reference to the law of the issuing state.

* * * * *

We are precluded, as are US Attorneys, from raising any matter in the nature of a defense which belongs to the member. Further, we have no ajudicatory [sic] authority in factual matters. Even if it is proven to us that you have made the payments alleged as delinquent in the process, we still cannot disobey the court order. Such would be a defense that, by necessity, would have to be raised by you in the Alabama court.

The divorce decree herein recites that "Defendant was duly served and failed to appear within the time required". Such may be untrue; however, it validates the face of the instrument. Any defect in jurisdiction or notice must be raised in the court.

The test of whether a court may exercise power over you is not limited to domicile or residence. There are many circumstances which would meet the "minimum contacts" required by the Supreme Court pronouncements in Hanson v. Denckla, 357 U.S. 235 and International Shoe v. Washington, 326, [sic] U.S. 310.

The Government's advice that it could not undertake to challenge the alimony/child support decree on his behalf is in accordance with the regulations of the Air Force at that time and is in accordance with current regulations of the Office of Personnel Management, detailed *infra*, which, under the majority view are void. In my view the regulations not only correctly implement the statute, but it would be contrary to basic fairness if the force of the Government is brought to bear on the side of one party to an essentially private dispute. In-

deed, it would entirely defeat the objective of the garnishment statute which is to remove persons from public assistance, if the Government must attempt to defeat the claims of dependent children and spouses, who are the only persons who can garnish federal wages.

Turning to Colonel Morton's "substantial claim," I can find no more in the record than a bald assertion that the support judgment was no good. The fact that he did not actually live in Alabama, and that Mrs. Morton so stated in the divorce papers, does not resolve the issue of jurisdiction of the Alabama courts. On the facts here, in my view, the support judgment was valid *ab initio*, but even if void, it was the basis for a valid judgment against the Government until set aside. In no event can the voidness of the underlying judgment be used as a sword against the Government.

What the majority wholly fails to appreciate is that 42 U.S.C. § 659(f) is designed not only to protect the Government itself from a claim like Colonel Morton's, but also to shield individuals who serve as disbursing officers. The record indicates that Colonel Morton has threatened individual Government officers with suit for their actions. The majority, by its interpretation of the statute injecting Fifth Amendment rights of due process, places a seal of approval on such *Bivens* claims.[11] The majority myopically looks only at protecting Colonel Morton, who is the only interested party whose rights remain fully protected if 42 U.S.C. § 659(f) is upheld by its terms. By its restrictive reading of 42 U.S.C. § 659(f), the majority destroys its intended purposes.

Also, contrary to the majority view, the rule of this case places an enormous administrative burden on all agencies of the Government. All regulations must be revised to conform to this decision. The majority's test of "notice of substantial irregularity" means no more,

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[11] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *See also Butz* v. *Economou*, 438 U.S. 478 (1978).

on the basis of the facts here, than that an employee must tell his pay officer or supervisor that he was not domiciled in the state asserting jurisdiction over him. Colonel Morton did no more than that, and his "supporting" evidence, a letter from his attorney advising him to *change* his domicile *from* Alabama, negated his claim. *No other "facts" relied on by the majority were even known until the trial.* The undercurrent in the opinion is that the Government owes a special duty to military personnel.[12] However, *all* employees of the Government are subject to garnishment of wages and a privileged class cannot be recognized within the confines of 42 U.S.C. § 659(f).

The regulations of the Office of Personnel Management [5 C.F.R. § 581.101 *et seq.* (1981)], too lengthy to quote in their entirety, are based on the interpretation of the statute and understanding of the Government's responsibilities previously given by all other administrative and judicial authorities. No provision is made for defending a suit for an employee or looking behind facial validity on penalty of double liability. For example, § 581.302 entitled "Notification of Obligor" provides:

> (a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:
>
> • • • • •
>
> (2) Of the maximum garnishment limitations set forth in § 581.402, with a request that the obligor submit supporting affidavits or other documentation necessary for determining the applicable percentage limitation;
>
> • • • • •

[12] The majority's emphasis on what Colonel Morton said he was told by military legal advisors confirms that the majority has recognized a tort claim not a pay claim.

(4) Of the percentage that would be deducted if he/she fails to submit the documentation necessary to enable the governmental entity to respond to the legal process within the time limits set forth in § 581.303.

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process:

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings:

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert; and

(4) That obligors in the uniformed services may avail themselves of the protections provided in sections 520, 521, and 523 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S. Code App. 501 et seq.).

§ 581.305(a) provides:

(a) The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

• • • • •

(6) Where notice is received that the obligor has appealed the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by a court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires com-

pliance with the legal process while an appeal is pending.

On facts virtually identical to those here, but with the further development that the state garnishment order was subsequently set aside, the Comptroller General of the United States rendered an opinion giving the following interpretation to the provisions of 42 U.S.C. § 659(f):

> As is indicated above, when the Air Force received the garnishment order, they reviewed it and found it valid on its face and in conformity with the Florida law. Sergeant Mathews has not shown that that finding was incorrect. Instead, he argued that the order was invalid because it was obtained by fraud, and that he had not been properly served *in the original court action against him.* As the Air Force advised him, these were matters for him to litigate in the courts and not for the Air Force to decide. That is, they were not challenges to the *facial validity of the garnishment order.* While the order was set aside in 1980, it was valid at the time payment was being made under it, and the Government had a duty to comply with it until the court modified it. There is no authority for reimbursement of the amounts withheld from Sergeant Mathews' pay, nor is there authority to reimburse him for the legal and other expenses he claims he incurred in having the order overturned.
>
> Accordingly, the disallowance of the claim is sustained.

In the Matter of Technical Sergeant Harry E. Mathews, U.S.A.F., File No. B-203668 (Comp. Gen. Feb. 2, 1982) (emphasis added).

By failing to give any consideration to the administrative interpretation, the majority invites reversal by the Supreme Court. As stated by the Supreme Court recently in reversing the Court of Claims in another pay case, *United States* v. *Clark*, 454 U.S. 555, 565 (1982):

> Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time.

To the same effect is the statement in *United States* v. *Hopkins*, 427 U.S. 123, 127 (1976) (*per curiam*):

> [W]e think that the Court of Claims gave insufficient attention to applicable administrative regulations when it undertook to decide the question.

It must also be added that the administrative interpretation ignored here has had the blessing of the other circuits.

In *Jizmerjian* v. *Dept of Air Force*, 457 F. Supp. 820 (D.S.C. 1978), *aff'd*, 607 F. 2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), in an action for retirement pay paid by the Government pursuant to garnishment in Arizona, the court questioned the basis for the exercise of jurisdiction over the judgment-debtor in the principal action but dismissed the suit against the Government on the basis of sovereign immunity as set forth in 42 U.S.C. § 659(f). The Arizona decree, like the Alabama decree here, stated no precise basis for jurisdiction and the ensuing contempt decree stated only that the Arizona court had "jurisdiction over the subject matter and the persons." *Id.* at 823. The *Jizmerjian* court, nevertheless held:

> Notwithstanding the able and articulate citation of authority in plaintiff's brief in opposition to defendant's motion [for summary judgment], this court is persuaded that 42 U.S.C. § 659(f) insulates the United States from this suit.

Id. at 824.

In *Overman* v. *United States*, 563 F.2d 1287, 1291 (8th Cir. 1977), the Eighth Circuit, construing 42 U.S.C. § 659(f), similarly held that the judgment-debtor could

not enjoin the Government from honoring the garnishment of his wages, stating: "Clearly, the defense of sovereign immunity applies here."

The majority decision will create chaos in how the Government must operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a "substantial claim of jurisdictional irregularity" regardless of the regularity of the process "on its face."

I would give 42 U.S.C. § 659(f) the same interpretation as the Comptroller General and the above courts. Given the various forms which a garnishment process can take and that garnishment may not even come from the court that entered the basic judgment, any other interpretation creates impossible administrative burdens. No more is required than that whatever process is served on the Government, the papers must be facially regular and be issued by a court with garnishment jurisdiction. There is no question here but that all process served on the Government was regular and came from the proper court under Alabama law. No violation of any regulation occurred. The statute by its terms provides immunity to the sovereign and its employees.

IV

Comity and Federalism

Suits against the Government resulting from garnishment of federal pay have taken many forms, but uniformly the result has been dismissal from the federal courts. The common theme found in each of these cases is that the federal court must defer to state remedies and procedures and not intrude into matters primarily of state interest.[13]

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[13] In any collateral relief from a judgment, which is what Colonel Morton seeks here, comity must be considered. (*See* Restatement (Second) of Judgments § 79 (1982).) Comity has even greater significance between state and federal courts.

The Eighth Circuit in *Overman* v. *United States*, 563 F.2d at 1292-93, succinctly defined the appropriate relationship between federal and state courts:

> There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension. *See, e.g., Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383, 50 S.Ct. 154, 74 L.Ed. 489 (1930); *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 34 L.Ed. 500 (1890); *Hernstadt* v. *Hernstadt*, 373 F.2d 316 (2d Cir. 1967), Such cases touch state law and policy in a deep and sensitive manner, and "[a]s a matter of policy and comity, these local problems should be decided in state courts." *Buechold* v. *Ortis*, *supra*, 401 F.2d at 373. This court will not lightly presume that Congress, when enacting § 659, meant for the federal courts to take over the entire domain of domestic relations law applicable to federal employees.[5] Moreover, we will not readily infer that Congress intended to permit federal agencies to be dragged in as defendants by any federal employee or spouse of an employee who, unhappy with a prior state adjudication, seeks to contest it by suing the Government over wage garnishment rather than challenging the divorce decree in an appropriate state forum.

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[5] The federal courts have uniformly rejected jurisdiction of garnishment proceedings whether the federal defendants have sought removal or action has been commenced initially in federal court. *Wilhelm* v. *United States Dept. of Air Force Accounting*, 418 F. Supp. 162 (S.D. Tex. 1976); *Popple* v. *United States*, 416 F. Supp. 1227 (W.D. N.Y. 1976); *Golightly* v. *Golightly*, 410 F. Supp. 861 (D. Neb. 1976); *Morrison* v. *Morrison*, 408 F. Supp. 315 (N.D. Tex. 1976); *West* v. *West*, 402 F. Supp. 1189 (N.D. Ga. 1975); *Bolling* v. *Howland*, 398 F. Supp. 1313 (M.D. Tenn. 1975).

In *Cunningham* v. *Department of Navy*, 455 F. Supp. 1370 (D. Conn. 1978), the Connecticut district court dis-

missed an action to enjoin the garnishment of the plaintiff's Navy retirement pay pursuant to garnishment proceedings in a New York court on a Virginia divorce decree. The plaintiff resided in Connecticut and had never resided in New York. He attacked the exercise of *in personam* jurisdiction over him by the New York court in rendering the judgment against him on which the garnishment order to the Navy was based. The court expressed doubt about the constitutionality of the New York long-arm statute as applied to Mr. Cunningham, but concluded that it was without power to consider plaintiff's collateral attack on the New York judgment.[14] Noting the deep concerns with respect to comity expressed in *Overman*, and by the Supreme Court in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), the *Cunningham* court held:

> Similar considerations should apply in the case at bar. Although plaintiff insists that his only claim is against an agency of the federal government, his extensive briefing on the New York matrimonial long-arm statute, his vehement argument regarding his non-liability for an alimony arrearage, and his documenting of his ex-wife's allegedly unconscionable behavior before the New York court belie the narrowness of his claim. He implicates domestic relations policies which are more properly within the interest of the two states involved—either New York or Virginia.

455 F. Supp. at 1372.

Other courts agree. In *West* v. *West*, 402 F. Supp. at 1192, the court stated:

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[14] The majority incorrectly states that the plaintiff in *Cunningham* did not attack lack of personal jurisdiction. This is precisely what he did attack in arguing that the *in personam* jurisdiction exercised by the New York court was unconstitutional. Colonel Morton makes the identical attack here.

> At this point, the only question which would arise in the case would concern the basis of the garnishment, a domestic relations type of issue not appropriate for resolution by this court. *See Barber* v. *Barber*, 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859).

In *Jizmerjian* v. *Dept. Of Air Force*, 457 F. Supp. at 824, the court advised:

> [H]is only possible successful method of attack on the Arizona alimony decree must take place in the Arizona state courts.

In *Popple* v. *United States*, 416 F. Supp. at 1228, the district court similarly deferred to the state:

> Plaintiff's real argument is that § 659 does not give a state court jurisdiction over an individual not resident in that state. This argument would properly be made in the state court that purported to garnish wages of an individual not resident in that state.

In *Garrett* v. *Hoffman*, *supra*, Judge Luongo construed 28 U.S.C. § 2283 (1970)[15] as precluding federal court action under similar circumstances:

> A litigant may not defeat the policy underlying § 2283—the avoidance of "needless friction between state and federal courts"—by framing the action as one for a declaratory judgment rather than as one

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[15] § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

See Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.").

for an injunction. *E.g., Dresser Indus., Inc.* v. *Insurance Co. of North America*, 358 F. Supp. 327, 330 (N.D. Tex. 1973); *Brooks* v. *Briley*, 274 F. Supp. 538, 558 (M.D. Tenn. 1967) (alternative holding) (three-judge court), *aff'd per curiam*, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647 (1968); *Rockefeller* v. *First Nat'l Bank*, 154 F. Supp. 122, 125 (S.D. Ga. 1957); C. Wright, Federal Courts § 47, at 204-05 (3d ed. 1976).

> The federal defendants here argue that this action "is in essence an attempt by plaintiff to invalidate and enjoin enforcement of the Florida judgment by resort to federal court." . . . . Plaintiff . . . asserts, this lawsuit challenges only "the Federal defendants' actions in failing to pay the plaintiff retired pay to which he is entitled." . . . . I cannot accept plaintiff's contention. An examination of the relief requested in his complaint makes it abundantly clear that plaintiff is ultimately attacking the Florida court's writs of garnishment.

441 F. Supp. 1156-57 (footnotes omitted). In *Wilhelm* v. *U.S. Dept of Air Force Accounting*, 418 F. Supp. 162 (S.D. Tex. 1976), the court similarly deferred to the state, in declining to accept removal from the Texas courts at the behest of the Government, stating:

> The Court has concluded that no policy or purpose will be served by construing § 1442(a)(1) in the present context to permit the removal of these domestic relations disputes to federal court. A broader construction of this provision would effect a profound alteration in the relationship between federal and state courts.

Id. at 166.

No sound policy warrants the friction the majority creates not only with Alabama, but with all other state jurisdictions. In my view, the majority is in clear conflict with the decision of the Supreme Court in *Trainor*

v. *Hernandez*, 431 U.S. 434 (1977), involving a constitutional challenge to the Illinois attachment statute. In dismissing the federal action, the court raised again the vital consideration "that in a Union where both the States and Federal Government are sovereign entities, there are *basic concerns of federalism* which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, *particularly with the operation of state courts.*" *Id.* at 441 (emphasis added). That concern is not found in the majority decision.[16]

The majority opinion would lead one to believe that the support judgment was not a considered judgment of the court. The majority refers to it as "a judgment by default." A default in the case was entered by the clerk. However, before the *judgment* in the case was given, Mrs. Morton was required to appear before the court to establish her entitlement to a money judgment. The decree in this case specifically states that "testimony" was given by Mrs. Morton. To obtain service by mail on her husband Mrs. Morton had correctly stated that he was a nonresident. The majority assumes that the Alabama court was either incompetent or ignored the fact of his non-residence in deciding that Mrs. Morton was entitled to a monetary award. *Lightell* v. *Lightell*, 394 So.2d 41 (Ala. Civ. App. 1981), cited by the majority, belies the inference that Alabama courts are little concerned with jurisdictional questions.

V

Jurisdiction of Alabama Court

The majority upholds the trial court's conclusion that Colonel Morton did not have sufficient contact with Alabama to bring him within the jurisdiction of its courts.

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[16] **Prior decisions of the U.S. Court of Claims have adhered to that principle. *Gunston* v. *United States*, 602 F.2d 816, 819 n.4 (Ct. Cl. 1979).**

There can be no dispute that, as the plaintiff, Colonel Morton would have the burden of proof of facts supporting that legal conclusion. The facts stated in the majority opinion in his favor have been given a gloss they do not deserve. Indeed, the record lacks vitality due to the absence of the most knowledgeable adversary, Mrs. Morton.[17] The record consists solely of answers to interrogatories and affidavits. There has in no sense been the kind of trial where facts are developed through testimony of witnesses subject to cross-examination. Moreover, the Government has no personal knowledge with which to counter Colonel Morton's self-serving statements.

However, even on this bland record, one can find no basic unfairness under the standards of *Kulko* v. *Superior Court of California*, *supra*, in the exercise of jurisdiction by the Alabama court since Colonel Morton had purposely availed himself "of the privilege of conducting activities within the forum State, invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

In 1974, the year in which Colonel Morton was served in the divorce proceedings, he was paying taxes to the state of Alabama and claiming Alabama as his permanent place of residence, not only on Air Force forms, but on his 1973 and 1974 federal tax returns (filed 1974 and 1975), where a deduction could have been taken for Alabama taxes. That in itself should be enough. By invoking the state's taxing authority Colonel Morton clearly sought "the benefits and protections of its law."

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[17] If this were legally a pay claim, rather than a negligence or breach of fiduciary duty claim, Mrs. Morton and the dependent child would be indispensable parties. There is only *one* claim to pay and there are conflicting claimants. *Hanson* v. *Denckla*, 357 U.S. 235 (1958). The majority has determined that adverse claimants have no rights without notice or an opportunity to be heard. Moreover, the Alabama court may continue to order payments under garnishment since the parties to that litigation are not bound by the judgment in this case.

Whether payment in Alabama also reduced his liability for taxes in Virginia, where he had to file as an actual resident, we do not know. None of his returns are in the record despite the request of the trial judge for these documents.

Moreover, he had used the state of Alabama in other ways over the years in addition to those mentioned by the majority. He registered one or more cars in Alabama after he had left the state. It is also apparent that Colonel Morton sought to invoke the law and courts of Alabama. On September 15, 1973, in anticipation of separation, Colonel Morton and his wife entered into a separation agreement. At that time they were residing in Virginia. It is apparent from this agreement that the parties contemplated that, if divorce proceedings were instituted, Alabama courts would be used.[18] He moved his wife and children to Alabama at Government expense by asserting it was *his* permanent residence. At that time, he avers, he hoped for a reconciliation.

After the Alabama court awarded the judgment for alimony and child support in the same amounts as he had been paying,[19] Colonel Morton continued to make payments to Mrs. Morton until December 1976, specifying on his check: "for divorce," "for child support," or simply the number of the payment since the separation agreement. His action indicates that he was generally satisfied with the decree and waived any objection to lack of personal jurisdiction which in itself is ground for finding the decree to be valid. Restatement, (Second) of Judgments §§ 5 and 61 (1982). He married Ronnette

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[18] The settlement agreement incorporated the particular grounds for divorce provided under Alabama law and was to serve as the basis for division of property, alimony and child support, if the parties were divorced on such grounds.

[19] Morton had been paying $500 a month under the settlement agreement then in effect since September 1973. The decree imposed no greater burden than he had agreed to.

Dreves in October 1975 in reliance on the Alabama divorce.

During the pendency of the divorce proceedings in Alabama (August 1974-August 1975), the parties were actively litigating the settlement agreement in Virginia from July 1974 until June 10, 1976. A letter from his attorney, whom the majority nevertheless treats as uninformed, advised him in August 1976 to change his domicile *from* Alabama.

Whether Colonel Morton intended to make, or made, Alaska his permanent domicile from the moment he transferred there in May 1974 is not proved by credible evidence [20] nor, in any event, of controlling significance. Accepting his statement of intent as true cannot overcome the facts of his relationship with Alabama which he asserted as a taxpayer for the entirety of 1974. He was, accordingly, subject to the jurisdiction of the Alabama court in 1974 and to service by mail, since he could not be physically served there, as permitted by the Alabama court.

VI

In view of the foregoing, I would reverse the judgment of the Claims Court.

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[20] He did not pay taxes in Alaska until 1976 (for 1975) and he moved from there in 1977.

APPENDIX

CODE OF ALABAMA—1975

ARTICLE 9.

GARNISHMENTS.

§ 6-6-370. "Garnishment" defined.

A "garnishment," as employed in this article, is process to reach and subject money or effects of a defendant . . ., in a judgment . . . in the possession or under the control of a third person, . . .; and such third person is called the garnishee.

* * * * *

§ 6-6-390. When process of garnishment obtainable.

The plaintiff . . . in any judgment on which execution can issue may obtain process of garnishment as defined in section 6-6-370 . . . .

§ 6-6-391. Affidavit of amount due plaintiff.

To obtain such writ of garnishment, the plaintiff, his agent or attorney must make, before an officer authorized to administer oaths, and file, with the clerk of the court in which . . . the judgment was entered, an affidavit stating the amount due from the defendant to the plaintiff, . . . that process of garnishment is believed to be necessary to obtain satisfaction thereof and that the person to be summoned as garnishee is believed to be chargeable as garnishee in the case. . . .

* * * * *

§ 6-6-393. Issuance and service of process.

Upon the filing of the affidavit . . ., the officer filing the same must issue process of garnishment and a copy thereof for each garnishee, to be served by the proper

officer, requiring the garnishee to appear within 30 days and file an answer, upon oath, whether, at the time of the service of the garnishment, at the time of making his answer or at any time intervening between the time of serving the garnishment and making the answer he was indebted to the defendant and whether he will not be indebted in future to him by a contract then existing, whether by a contract then existing he is liable to him for the delivery of personal property or for the payment of money which may be discharged by the delivery of personal property or which is payable in personal property and whether he has not in his possession or under his control money of effects belonging to the defendant.

* * * * *

§ 6-6-430. Filing of bond; discharge of money or property from garnishment; proceedings as if bond not executed; judgment; discharge of garnishee.

(a) When garnishment has been issued . . . upon a judgment, the defendant may make and file with the issuing the garnishment bond in such sum as the judge judge or clerk issuing the garnishment bond in such sum as the judge or clerk may prescribe, not exceeding twice the amount of the plaintiff's demand, payable to the plaintiff, with sufficiency surety, to be approved by such judge or clerk, conditioned to pay the amount for which the garnishee may be found indebted or liable to the defendant and the cost of the garnishment. Thereupon, the money or property in the hands of the garnishee is discharged from the garnishment and the garnishee relieved of all liability therefor to the plaintiff; but the garnishee must answer, and, except as is otherwise provided in this article, the case must proceed and be determined as if such bond had not been executed.

* * * * *

(c) The garnishee is not discharged from liability to the defendant until he has paid the debt or satisfied the demand the garnishment was intended to reach.

* * * * *

§ 6-6-450. Filing of answer; notice thereof; oral examination.

The garnishee must answer under oath according to the terms of the garnishment; and, upon filing, the clerk or register shall give the plaintiff and defendant notice. . . .

* * * * *

§ 6-6-452. Payment of defendant's money into court if garnishee admits possession thereof.

If the garnishee admits the possession of money belonging to the defendant, he must pay the same or so much thereof as may be necessary to satisfy the plaintiff's demand and costs into court to await the order of the court; and, if he fails to make such payment, he is liable as if he had admitted an indebtedness for the amount of such money.

§ 6-6-453. Payment of indebtedness or liability to clerk; effect thereof; ordering of deposit by court.

(a) When the garnishee admits indebtedness or liability to the defendant and the defendant has not executed bond for the dissolution of the garnishment, as provided in division 4 of this article, the garnishee may, by order of the court first had and obtained, pay the amount of such indebtedness or liability or so much thereof as the court may direct into the hands of the clerk, to be held subject to the judgment in the case. Such payment has the effect to discharge the garnishee from liability for the amount so paid and interest subsequently accruing thereon . . . .

* * * * *

§ 6-6-454. Judgment where answer admits indebtedness to defendant.

If the garnishee answers and admits indebtedness to the defendant, judgment thereon must be entered against him, . . . for the amount so admitted, if less than the

amount of the judgment against the defendant, or, if more or equal thereto, for the amount thereof . . . .

* * * * *

§ 6-6-457. Proceedings on failure to appear and answer.

If the garnishee fails to appear and answer, a conditional judgment must be entered against him for the amount of the plaintiff's claim, as ascertained by his judgment, to be made absolute unless he appears within 30 days after notice of the conditional judgment issued by the clerk, to be served on him, as other process, by the sheriff. If he fails to appear within the time required by the notice served upon him or if two notices are returned "not found" by the sheriff of the county in which the garnishment was executed, the judgment must be made absolute.

* * * * *

§ 6-6-459. Contest of answer by defendant.

The defendant, upon the coming in of the answer, may, within 30 days after notice of the filing of the answer, allege that the garnishee is indebted to him in a larger sum than he has admitted, is otherwise liable to him on a demand, the subject of garnishment, or that he holds money or effects of the defendant not admitted in his answer, which, being reduced to writing setting forth particularly in what respect the answer is deficient and being sworn to, an issue must thereupon be made up, under the direction of the court, which must be tried by a jury if required by either party; but such controversy shall not prevent the plaintiff from taking judgment upon the answer of the garnishee.

* * * * *

§ 6-6-461. Effect of judgment for plaintiff as between garnishee and defendant.

The judgment condemning the debt, demand, money or effects to the satisfaction of the plaintiff's demand is con-

clusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment, which he may do in his own name; and, if such judgment is stayed by bond and the garnishee is notified of the fact, he is not permitted to discharge such judgment pending the appeal.

* * * * *

§ 6-6-463. Disposition of claims of other persons suggested by garnishee.

* * * * *

(e) The interposition of these collateral issues [*i.e.*, third party claimants] does not affect the jurisdiction of the court obtained by . . . service of garnishment.

* * * * *

§ 6-6-464. Appeals.

An appeal lies to the supreme court or the court of civil appeals, as the case may be, at the instance of the plaintiff, the defendant, the garnishee or the contestant or claimant.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 290-77

ALLAN WAYNE MORTON, APPELLEE

v.

THE UNITED STATES, APPELLANT

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

/s/ George A. Hutchinson
Clerk

Date—July 5, 1983

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 290-77

(Filed December 14, 1981)

ALLAN WAYNE MORTON

v.

THE UNITED STATES

Military pay; garnishment; domicile; "minimum contacts"; jurisdiction of state court; legal process.

OPINION *

WHITE, *Senior Trial Judge*: In the petition, as amended, Allan Wayne Morton, a colonel in the U.S. Air Force and usually referred to hereafter in the opinion as "the plaintiff" or as "Colonel Morton," seeks to recover $18,136.54, representing amounts which the United States Air Force allegedly deducted from his pay as a commissioned officer on active duty and paid over to the Circuit Court for the Tenth Judicial Circuit of Alabama pursuant

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

to writs of garnishment issued by that court. The writs of garnishment were ancillary to a decree for divorce, alimony, and child support, which the Alabama court entered in a case filed against Colonel Morton by his then wife, Patricia Kay Morton.

The plaintiff and Patricia Kay Morton were married in 1954 and separated in September 1973. At the time of the separation, the Mortons had two minor sons, one about 16½ years old and the other almost 13 years old.

During the 4-year period immediately preceding their separation, the Mortons and their two minor sons lived in a home which they had purchased in Loudoun County, Virginia. One important factor in the separation was that the plaintiff was notified in August 1973 that his next Air Force assignment would be in the State of Alaska, and Patricia Kay Morton was unwilling to accompany the plaintiff to Alaska.

On September 15, 1973, the plaintiff and Patricia Kay Morton, in anticipation of their imminent separation, signed a document entitled "Separation Agreement." This agreement provided that the real and personal property which the couple had accumulated was to be divided between them in a specified manner, with the plaintiff receiving the Loudoun County house and paying off the mortgage; that Patricia Kay Morton was to have the sole custody and control of the two minor sons, with the plaintiff to have reasonable visitation rights; and that the plaintiff was to pay Patricia Kay Morton, as separate maintenance payments that were to include support for both children, the sum of $500 per month for 30 months and, thereafter, $200 per month for 33 months. The settlement agreement also contained the following provision (among others):

> * * * Any decree entered in any action for divorce which may be requested by either party shall be agreed to by the other party and shall be consistent

with the terms of this agreement and the court is requested to include this agreement in the decree.
* * *

On or about September 16, 1973, the plaintiff and Patricia Kay Morton separated. Patricia Kay Morton and the two young sons moved to Alabama, where she and the plaintiff had married and had lived for the first 3 years of their married life. The plaintiff remained in the Loudoun County house until May 1974, when he moved to Alaska pursuant to the Air Force assignment previously mentioned.

The separation agreement of September 15, 1973, was later involved in a suit for specific performance which the plaintiff filed (through counsel) in July 1974 against Patricia Kay Morton in the Circuit Court of Loudoun County, Virginia. The filing of the suit was triggered by Patricia Kay Morton's refusal to sign the deed conveying the Loudoun County house to the purchasers with whom the plaintiff had contracted to sell the house. (Under the separation agreement, the house was to be the property of the plaintiff.) In a decree which the Loudoun County court entered on March 25, 1976, following a trial, the separation agreement of September 15, 1973, was set aside, cancelled, and annulled. The plaintiff thereupon gave notice of appeal to the Supreme Court of Virginia. During the pendency of the appeal, the plaintiff and Patricia Kay Morton settled all matters involved in the Virginia case, including the setting aside of the separation agreement. Pursuant to this settlement Patricia Kay Morton received $12,500 in cash from the sale of the Loudoun County house, and she was permitted to keep all the property (furniture, china, silver, crystal, other valuables collected by the Mortons over the years, and an automobile) which she had taken with her when she moved to Alabama from Virginia in September 1973. In view of the settlement, the Circuit Court of

Loudoun County entered a final decree on June 10, 1976, dismissing the cause.

In addition to paying Patricia Kay Morton the sum of $12,500 in settlement of the Virginia litigation, the plaintiff voluntarily continued to make child support payments, as he felt a moral obligation to do so. These child support payments were at the rate of $500 per month until the older child became 18 years of age, and then at the reduced rate of $250 a month for the younger child, until Patricia Kay Morton began garnishing the plaintiff's pay under circumstances described hereafter.

On August 28, 1974 (during the pendency of the case in Loudon County, Virginia), Patricia Kay Morton filed suit in the Circuit Court for the Tenth Judicial Circuit of Alabama against Colonel Morton for divorce, for the custody of the two minor children, together with support and maintenance for the children, and for alimony.

Suit papers in the Alabama divorce proceeding were sent by registered mail to Colonel Morton in Alaska. He received them on September 17, 1974. No personal service was made on Colonel Morton at any time or at any place in connection with the Alabama divorce suit.

Colonel Morton did not make an appearance at any time in the Alabama divorce suit.

Colonel Morton having failed, within the time permitted, to plead or otherwise defend the suit, judgment by default was entered against him on August 14, 1975, by the Circuit Court for the Tenth Judicial Circuit of Alabama. The judgment granted Patricia Kay Morton a divorce from Colonel Morton, it awarded to her the custody of the two children, and it ordered Colonel Morton to pay to Patricia Kay Morton the sum of $500 each month "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance of the * * * minor children." (As of August 14, 1975, the older son was already past the age of 18.)

On December 27, 1976, the Air Force Finance Officer received by certified mail a writ of garnishment which

had been issued by the Register of the Circuit Court for the Tenth Judicial Circuit of Alabama as ancillary to the decree of August 14, 1975. The writ sought to garnish pay of the plaintiff in the amount of $4,100. It was accompanied by a copy of the judgment in the Alabama divorce case, which recited that Colonel Morton was to pay $500 per month to Patricia Kay Morton "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance for the * * * minor children." The writ was also accompanied by an affidavit executed by Patricia Kay Morton, stating that the sum of $4,100 was due and owing "for ailmony and child support" under the judgment dated August 14, 1975. (As of December 27, 1976, when these papers were received by the Air Force Finance Office, the older Morton son was not only past the age of 18, but he was also married.).

The Air Force promptly notified the plaintiff regarding the receipt of the writ of garnishment. The plaintiff took the position before the Finance Office—on the advice of an attorney in the Judge Advocate's Office—that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction, as he was neither domiciled nor a resident of Alabama and he was never properly served or notified of the Alabama divorce proceeding. He also informed the Finance Office that he had paid all of his obligations to Patricia Kay Morton.

As the writ of garnishment was issued on the regular form used by the Alabama courts, the Air Force Finance Office honored the writ of garnishment despite the plaintiff's protest, made deductions from the plaintiff's pay, and paid $4,100 over to the Circuit Court for the Tenth Judicial District of Alabama. It appears that the Finance Office did not seek advice from the Judge Advocate General's Office, which is the law office of the Air Force.

Subsequently, the Air Force Finance Office received additional writs of garnishment from the Circuit Court for the Tenth Judicial Circuit of Alabama. These writs,

which were also on the regular form used by the Alabama courts, sought to garnish additional pay of the plaintiff. The evidence in the record does not show whether—and, if so, when—the plaintiff was notified of the receipt of these writs. Although the plaintiff, in connection with the December 27, 1976, writ of garnishment, had informed the Finance Office that the Alabama Court did not have jurisdiction to enter a judgment against him for alimony and child support, the Finance Office honored the writs of garnishment referred to in this paragraph, made deductions from the plaintiff's pay, and paid the money over to the Circuit Court for the Tenth Judicial District of Alabama. All of these writs were honored after the older Morton son was past the age of 18 and was married, and some of the money was deducted from the plaintiff's pay and paid over to the Alabama court after the younger son was past the age of 18.

The present action was subsequently filed by the plaintiff to recover the money thus garnished.

The plaintiff and the defendant sought to dispose of this action by filing cross-motions for summary judgment. Both motions were denied by the court, without prejudice to either party, in an order dated May 19, 1978. The court stated (in part) that on the basis of the materials submitted in connection with the motions, it could not say whether or not the Alabama court had jurisdiction to enter a money judgment against the present plaintiff for alimony and child support, or whether the legal process served on the United States on behalf of Patricia Kay Morton was regular on its face.

The court remanded the case to the trial division; and indicated that the initial task would be to develop the facts with respect to two issues:

First, whether the plaintiff was a domiciliary of the State of Alabama when Patricia Kay Morton filed her divorce action in August 1974.

Second, whether the Circuit Court for the Tenth Judicial Circuit of Alabama relied upon and merged the sep-

aration agreement of September 15, 1973, into the final divorce decree when the Alabama court granted the award of $500 per month to Patricia Kay Morton for alimony and child support.

The two issues will be discussed in reverse order.

The Merger Issue

The evidence in the record clearly shows that the separation agreement of September 15, 1973, between Colonel Morton and Patricia Kay Morton was not introduced before the Circuit Court for the Tenth Judicial Circuit of Alabama and was not made a part of the record in the divorce case which Patricia Kay Morton filed against Colonel Morton.

Accordingly, the separation agreement was not relied upon and merged into the final divorce decree when the Alabama court granted to Patricia Kay Morton the award of $500 per month for alimony and child support.

The Domicile Issue

The essential elements of domicile are residence in fact, coupled with the purpose to make the place of residence one's home. *Texas* v. *Florida*, 306 U.S. 398, 424 (1939). As the plaintiff was born in the State of Alabama on April 15, 1934, and lived there continuously until July 1957, it is obvious that the plaintiff was domiciled in Alabama for the first 23 years of his life, at least.

Also, it must be borne in mind that, once acquired, a person's domicile continues until a new one is acquired. *Desmare* v. *United States*, 93 U.S. 605, 610 (1876).

The plaintiff contends, however, that Alabama was no longer his domicile during the period between August 28, 1974, when Patricia Kay Morton filed suit against him in Alabama for divorce, for child custody and support, and for alimony, and August 14, 1975, when the Alabama court entered judgment by default against him in the divorce case.

The plaintiff moved from Alabama in July 1957 because he had entered the U.S. Air Force and had been assigned to Warner Robins, Georgia. He and Patricia Kay Morton and their older son, who was only a few months old at the time, moved to Georgia in July 1957; and they lived there together as a family until 1960.

When the plaintiff entered the Air Force and moved from Alabama to Georgia, he intended never to return to Alabama again to live. On the other hand, the plaintiff did not have any intention at the time of making Georgia his permanent home. It was the plaintiff's intention at that time to establish a domicile in Florida, and eventually to retire to Florida at the end of his military service. The plaintiff subsequently made efforts to obtain Air Force assignments to bases in Florida, so that he could purchase a home there and establish his domicile in Florida, but his efforts in that direction were unsuccessful. The plaintiff never became a resident of Florida; and, therefore, despite his intention, he never became a domiciliary of that State because the essential element of residence in fact was lacking.

Pursuant to military assignments which the plaintiff received from the Air Force, he and his family moved to, and lived together in: Ohio from August 1960 to June 1961; in Georgia again from June 1961 to June 1963; in the Philippine Islands from June 1963 to June 1965; and in New York from June 1965 to June 1968.

The plaintiff was assigned to military duty in Vietnam in June of 1968, and he served there until June of 1969. While the plaintiff was serving in Vietnam, Patricia Kay Morton and the two Morton children lived in St. Petersburg, Florida.

When the plaintiff returned to the United States from Vietnam in 1969, he and Patricia Kay Morton bought their first home in Loudoun County, Virginia. They lived together there until Patricia Kay Morton left the plaintiff in September 1973 and moved back to Alabama, taking the Morton children with her. The plaintiff con-

tinued to live in the Virginia house until May of 1974, when he moved to Alaska.

Shortly before leaving for Alaska, the plaintiff entered into a contract for the sale of the Virginia house. It was Patricia Kay Morton's refusal to sign the deed conveying the Virginia house to the purchasers that led to the Virginia litigation, previously mentioned in the opinion, which the plaintiff instituted against Patricia Kay Morton for specific performance of the separation agreement dated September 15, 1973.

There is nothing in the evidence to indicate that, during the various periods when the plaintiff was living in Georgia (twice), in Ohio, in the Philippine Islands, in New York, in Vietnam, and in Virginia, the plaintiff ever intended to make any of these places his home. Consequently, as the essential element of intention was lacking, the plaintiff did not establish a new domicile in any of the localities just named. In view of this, it must necessarily be concluded that Alabama continued to be the State of the plaintiff's domicile despite his intention, on leaving Alabama in 1957, never to return to that State to live. As previously stated, once domicile is acquired in a locality by an individual, it continues until a new one is acquired. *Desmare* v. *United States, supra*, 93 U.S. at 610.

The plaintiff moved from Virginia to Alaska in May 1974 pursuant to a new Air Force assignment. Previously, in 1972 or earlier, the plaintiff had visited Alaska; and when he first saw that State, he changed his mind about establishing a domicile in Florida, because he knew that he wanted to make his permanent home in Alaska. As early as 1972, the plaintiff orally asked the Air Force for an assignment to Alaska, but he did not receive such an assignment at that time. In 1973, he again asked for an assignment to Alaska; and in accordance with this request, he received an assignment to Anchorage, Alaska, as of May 1974.

When the plaintiff moved to Alaska in May 1974, it was his intention to purchase a home in Alaska and to establish a domicile in that State. He made his intention known at the time to associates.

On June 1, 1974, shortly after the plaintiff arrived in Alaska, he entered into a contract to purchase a home for himself in Anchorage, Alaska.[1] The plaintiff continued to live in Alaska until 1977, when the Air Force transferred him to Andrews Air Force Base, Maryland.

A change in domicile requires physical presence at the new location, plus an intention on the part of the individual to make the new location his or her home, and the absence of any intention to have a home at a former domicile. *Stamer* v. *United States*, 148 Ct. Cl. 482, 490 (1960); *cf. Holmes* v. *Sopuch*, 639 F.2d 431, 433 (8th Cir. 1981). When these elements concur, the change in domicile is instantaneous. *Spurgeon* v. *Mission State Bank*, 151 F.2d 702, 705-06 (8th Cir.), *cert. denied*, 327 U.S. 782 (1945).

With respect to the plaintiff, the essential elements for acquiring a new domicile concurred when the plaintiff arrived in Alaska during the month of May 1974. From then until 1977, the plaintiff was an actual resident of Alaska, it was his intention to make Alaska his home, and he lacked any intention to have a home at a former domicile. Accordingly, it necessarily follows that the plaintiff was a domiciliary of Alaska, and not of Alabama, during the 1974-75 period when the divorce proceeding against him in Alabama was in progress.

Before concluding this part of the opinion, comments should be made on several points mentioned by the defendant in its brief as allegedly showing that the plaintiff was still a domiciliary of Alabama while the divorce proceeding against him was still in progress.

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[1] It later became impossible for the plaintiff to consummate this contract because of financial difficulties attributable to the refusal of Patricia Kay Morton to sign the deed conveying the Virginia house to the purchasers.

1. The defendant calls attention to the fact that the plaintiff, on entering the military service in 1957, listed Birmingham, Alabama, as his "Home of Record."

In military parlance, the term "Home of Record" designates the State from which a member enters the military service. It is used for the purpose of fixing travel and transportation allowances. The "Home of Record" is not necessarily a member's State of legal residence or domicile.

The terms "legal residence" and "domicile" are used in the military service interchangeably to denote the place where a member has his or her permanent home, and to which, whenever the member is absent, he or she has the intention of returning. As indicated earlier in the opinion, after the plaintiff left Alabama in 1957, he never had any intention of returning to Alabama to live.

2. The defendant refers to the supposed listing by the plaintiff "of Alabama as his legal residence for tax purposes from 1965 to April 15, 1976 * * *."

Actually, it was the Air Force—and not the plaintiff—that listed Alabama as the plaintiff's legal residence for the payment of state income taxes. This was done without the plaintiff's consent and without checking with the plaintiff. Upon learning of this in June 1974, the plaintiff asked the Air Force Finance Office to correct the error by showing Alaska as the State to which state income taxes would be paid. The requested correction was not made, however, until April of 1976, after the plaintiff had been to the Finance Office three separate times and had, on three occasions, submitted a form to effect the change.

3. The defendant relies on evidence showing that the plaintiff paid state income taxes to Alabama for 1973 and 1974.

In 1973, when the plaintiff and Patricia Kay Morton separated, the plaintiff agreed to have Patricia Kay Morton's household goods moved to Alabama as a part of his military household goods move. It was his belief

that in order to do this, it was necessary that he file an Alabama income tax return for the year 1973; and, accordingly, in 1974 the plaintiff and Patricia Kay Morton filed a joint income tax return in Alabama for the year 1973. The Mortons also filed a state income tax return in Virginia for the year 1973, as they were both residents of that State for the greater part of the year and the plaintiff was a Virginia resident for the entire year.

The plaintiff also filed an income tax return in Alabama for the year 1974, as stated by the defendant. In that year, the plaintiff and Patricia Kay Morton were litigating in the Circuit Court of Loudoun County, Virginia, over the separation agreement of September 15, 1973, but they were still married. Patricia Kay Morton was employed in Alabama and receiving income in that State, while the plaintiff's 1974 income was received partially in Virginia and partially in Alaska. The ultimate outcome of the Virginia litigation was unknown. The plaintiff reasoned that if the Virginia court should set aside the separation agreement and he lost the tax break of a unitary award tax deduction, Patricia Kay Morton might agree to amend their separate income tax returns and to file income tax returns for 1974 jointly with the plaintiff, because they were still married and they would both benefit from such a joint filing. This did not happen, however.

The evidence shows that the plaintiff's actions in filing state income tax returns in Alabama for 1973 and 1974 were attributable to the exigencies of the situation in which he found himself due to the breakup of his marriage, and did not reflect any intention to make his home again in Alabama.

4. The defendant asserts that sometime after moving to Alaska, the plaintiff "expressed his intention to leave Alaska and again reside in Virginia * * *." This contention is based on a letter which plaintiff's counsel in the Virginia litigation wrote to him on December 17,

1975, concerning (among other things) plaintiff's house in Virginia, which had not yet been sold and was involved in the Virginia litigation. Plaintiff's counsel made the following statement (among others) in the letter:

> • • • The last correspondence I had from you indicated that you were returning to the Washington area and wanted to live in the house yourself. You have an absolute right to do that. In fact, I was under the impression that you would have long since been back here.

This statement by plaintiff's counsel does not provide any support for the defendant's contention that the plaintiff was a domiciliary of Alabama during the divorce proceeding in that State.

5. The defendant states in its brief that the plaintiff did not register to vote in Alaska until 1974 (he did not move to Alaska until 1974), and that he did not pay state income taxes in Alaska for any year earlier than 1975. The matter of the plaintiff's state income tax returns has already been discussed in item 3.

6. Finally, the defendant says in its brief that "plaintiff conveyed to his attorney the impression that he was still a domicile [sic] of Alabama as late as August 1976."

This is based on a letter which plaintiff's counsel in the Virginia litigation wrote to the plaintiff on August 18, 1976. This letter reflects the attorney's view that the plaintiff was still a legal resident of Alabama and should change his legal place of residence. There is nothing to indicate, however, that the plaintiff himself had "conveyed" such an impression to his counsel, or that the latter had carefully researched the question of the plaintiff's domicile. In any event, the plaintiff is not bound by an opinion on the matter of his domicile expressed by a Virginia attorney in August 1976.

None of the points made by defendant in its brief warrants any change in the opinion previously expressed

that the plaintiff was a domiciliary of Alaska, and not of Alabama, when the divorce proceeding against him in Alabama was in progress.

The "Minimum Contacts" Issue

The defendant argues that, even if Colonel Morton was not a domiciliary of Alabama at the time when the divorce proceeding against him was in progress, and although he was not served with process in Alabama, the Alabama court nevertheless had jurisdiction to enter judgment against Colonel Morton for child support and alimony. In making this argument, the defendant relies on the "minimum contacts" standard originally announced by the Supreme Court in *International Shoe Company* v. *Washington*, 326 U.S. 310 (1945). In that case, the Court said (at 316) that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice' " (citations omitted).

The Court later held in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), that the "minimum contacts" standard should be applied also to state court actions *in rem*, involving the property interests of nonresident defendants not served personally within a State. The Court made the sweeping statement (at 212) that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" (footnote omitted; emphasis added to "all").

Thus, the use of the "minimum contacts" standard in determining whether the Alabama court had jurisdiction to enter against the nonresident Colonel Morton an award of $500 per month for alimony and child support does not depend on whether the Alabama proceeding, insofar as Patricia Kay Morton sought alimony and child support, was an action *in personam* or an action *in rem* or *quasi*

in rem (on the theory that Colonel Morton's salary was located in Alabama). It seems to be clear, however, that the obligation of the Air Force to pay Colonel Morton for his military service was in the nature of a debt owed to Colonel Morton; and that the property interest in the debt belonged to Colonel Morton as creditor and followed his domicile, which was Alaska at the times involved in this litigation, because "[d]ebts can have no locality separate from the parties to whom they are due." *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320 (1872). Consequently, all aspects of the Alabama proceeding constituted an action *in personam*.

Obviously, the plaintiff's contacts with the State of Alabama during the first 23 years of his life were vastly more than "minimum contacts." He was born in Alabama; he resided there continuously from the time of his birth until July 1957; he received his education in Alabama, through the college level; he was married in Alabama; and his first child was born in Alabama. However, it would offend "traditional notions of fair play and substantial justice" if the plaintiff's contacts with Alabama prior to July 1957 were to be regarded as necessarily conferring jurisdiction on the Alabama courts to enter a money judgment against him some 18 years later, when the plaintiff was a domiciliary and actual resident of Alaska, was not served personally within the territorial limits of Alabama, and did not do anything to subject himself to the jurisdiction of the Alabama court.

The circumstance that the plaintiff's minor children were living in Alabama during the 1974-75 period with his consent and he was providing financial support for the children was not sufficient to confer on the Alabama court jurisdiction to enter a money judgment against Colonel Morton for alimony and child support on the "minimum contacts" theory. *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978).

Colonel Morton's contacts with Alabama to which some significance might be attached were: his action in filing,

with Patricia Kay Morton, a joint income tax return in Alabama for the year 1973; and his action in filing an individual income tax return in Alabama for the year 1974. The reasons for these actions by Colonel Morton have already been discussed in another part of the opinion. The joint return for 1973 was filed because Colonel Morton believed that it was necessary that this be done in order that Patricia Kay Morton's household goods might properly be moved from Virginia to Alabama as part of the plaintiff's military household goods move. The individual return for 1974 was filed because Colonel Morton and Patricia Kay Morton were still married in 1974, she had earned income in Alabama and he had earned income in Virginia and Alaska during that year, and Colonel Morton anticipated that it might later be advisable (depending on the outcome of the then-pending litigation in Virginia) for him and Patricia Kay Morton to amend their separate income tax returns for 1974 and file joint returns. Also, Colonel Morton's request to the Air Force that his pay records be corrected to show Alaska, rather than Alabama, as the State to which his state income taxes were payable had not yet been honored.

The facts concerning the Alabama income tax returns for 1973 and 1974 show that it was not Colonel Morton's purpose, in filing the returns in Alabama, to derive any benefit from the State of Alabama.

In order to justify a determination in the present case that the Alabama court had jurisdiction to enter judgment against Colonel Morton for alimony and child support under the "minimum contacts" theory, it would be necessary that the evidence in this case show acts by which Colonel Morton purposefully availed himself of the privilege of conducting activities within Alabama, thus invoking the benefits and protection of its laws. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). Such evidence is lacking.

It is my opinion, therefore, that the Alabama court did not have jurisdiction, under the "minimum contacts" standard, to enter a money judgment for child support and alimony against Colonel Morton in the divorce case.

The Legal Process Issue

The defendant, correctly stating that the writs of garnishment involved in the present case were on the regular form used by the Alabama courts, argues that the Government is therefore insulated against liability by subsection (f) of the garnishment statute (42 U.S.C. § 659, as amended by Pub. L. 95-30, § 501, 91 Stat. 157). Subsection (f) provides as follows:

> (f) Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section [659] and the regulations issued to carry out this section.

The defendant, in arguing that subsection (f) is dispositive of the present case, relies mainly on *Overman* v. *United States*, 563 F.2d 1287 (8th Cir. 1977). In that case, a couple named Overman were divorced in Tennessee, and Mr. Overman was ordered by the Tennessee court to make periodic alimony and child support payments to Mrs. Overman. Mr. Overman later moved to Missouri, where he was employed by the Veterans Adminstration. Mr. Overman fell behind on the support obligation, and Mrs. Overman secured a writ of garnishment on his salary and served it by mail on Mr. Overman, on the United States, and on the disbursing officer of the Veterans Administration. Mr. Overman then sought to enjoin the disbursing officer from honoring the writ of garnishment, on the ground that the underlying Tennessee divorce decree had been obtained through

fraud. In upholding the dismissal of the suit by the court below, the Court of Appeals said (at 1292-93):

> * * * [W]e will not readily infer that Congress intended to permit federal agencies to be dragged in as defendants by any federal employee * * * who, unhappy with a prior state adjudication, seeks to contest it by suing the Government over wage garnishment rather than challenging the divorce decree in an appropriate state forum. To have federal courts adjudicating such disputes, where the only federal connection is garnishment of government wages, would truly be a case of the tail wagging the dog. * * *

The *Overman* case is readily distinguishable from the case that is now before this court. There was no contention in the *Overman* case that the Tennessee court which ordered Mr. Overman to make alimony and child support payments to Mrs. Overman lacked jurisdiction over the person of Mr. Overman, but, rather, that fraud had been involved in the divorce proceeding before the Tennessee court. In the present case, as pointed out in earlier parts of this opinion, the Alabama court which ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton did not have jurisdiction over the person of Colonel Morton.

It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418 (1957). As the Alabama court did not have jurisdiction over the person of Colonel Morton, it was without jurisdiction to adjudicate Patricia Kay Morton's claim against him for alimony and child support; and, therefore, the portion of the Alabama court's decree ordering Colonel Morton to make alimony and child support payments to Patricia Kay Morton was void for lack of jurisdiction.

The writs of garnishment involved in the present case were issued as incidents to the decree of the Alabama court. As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree on which they were based. *Laborde* v. *Ubarri*, 214 U.S. 173, 174 (1909).

Furthermore, it will be noted that subsection (f) of the garnishment statute insulates the Government from liability only if funds are deducted from the pay of government personnel and paid out pursuant to a writ of garnishment that qualifies as "legal process regular on its face" and if "such payment is made in accordance with * * * the regulations issued to carry out this section."

The pertinent regulations are found in Part 581 of Title 5, Code of Federal Regulations. Section 581.102(f) of Title 5, CFR, defines "legal process" in part as follows:

> (f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, * * * which—
>
> (1) Is issued by:
>
> (i) *A court of competent jurisdiction*, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia * * *. [Emphasis supplied.]

As the Alabama court, in purporting to order Colonel Morton to make alimony and child support payments to Patricia Kay Morton, was not a "court of competent jurisdiction" because it had not acquired jurisdiction over the person of Colonel Morton, the void ancillary writs of garnishment which the Air Force Finance Office honored in this case did not constitute the sort of "legal process"

that would have insulated the Government against liability.

Conclusion

For the reasons previously outlined, it is concluded that the Air Force Finance Office acted arbitrarily and illegally when it ignored the plaintiff's protest that the Alabama court did not have jurisdiction to enter a money judgment against him for alimony and child support, made deductions from the plaintiff's pay, and paid the money over to the Circuit Court for the Tenth Judicial Circuit of Alabama pursuant to writs of garnishment that were void because they were ancillary to a court decree which was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton.

The plaintiff is entitled to recover the money that was illegally deducted from his pay pursuant to the void writs of garnishment.

FINDINGS OF FACT

1. (a) Allan Wayne Morton, a colonel in the Air Force and usually referred to hereafter in the findings as "the plaintiff" or as "Colonel Morton," was born in Birmingham, Alabama, on April 15, 1934. He resided in Birmingham until he went away to college.

(b) At the time of the filing of the petition in this case, the plaintiff was on active duty in the U.S. Air Force.

2. The plaintiff received a bachelor's degree from the University of Alabama in 1957, and a master's degree from Georgia Tech in 1963.

3. (a) The plaintiff married Patricia Kay Morton in Birmingham, Alabama, in 1954.

(b) The plaintiff and Patricia K. Morton had two children, Allan L. Morton, born February 7, 1957, and Brian D. Morton, born November 17, 1960.

(c) Allan L. Morton married in November 1976.

(d) Brian D. Morton became a member of the U.S. Air Force on January 3, 1979.

4. The plaintiff and Patricia Kay Morton maintained their marital residence in the State of Alabama, first in Tuscaloosa and later in Birmingham, from the time of their marriage in 1954 until July of 1957.

5. The plaintiff entered the U.S. Air Force from the State of Alabama in July 1957. At that time, he and Patricia Kay Morton and their first child, then only a few months old, moved to Warner Robins, Georgia, where they lived together until 1960.

6. (a) Upon entering the military service, the plaintiff gave his "Home of Record" as Birmingham, Alabama. No change in this designation had been made as of October 11, 1977.

(b) In military parlance, the term "Home of Record" designates the State from which a member enters the military service, and it is used for the purpose of fixing travel and transportation allowances. The "Home

of Record" is not necessarily a member's State of legal residence or domicile,

(c) "Legal residence" and "domicile" are used in the military service interchangeably to denote the place where a member has his or her permanent home and to which, whenever the member is absent, he or she has the intention of returning.

(d) The plaintiff did not, at any time during his military service, designate the State of Alabama as his legal residence or domicile.

7. (a) When the plaintiff entered the Air Force and moved from the State of Alabama, he intended never to return to Alabama again to live. It was the plaintiff's intention at that time to make Florida his permanent home, and eventually to retire to Florida.

(b) Subsequently, the plaintiff made efforts in 1965 and 1968 to obtain from the Air Force assignments to bases in Florida, so that he could purchase a permanent home there and establish his domicile in Florida. The plaintiff's efforts in that direction were unsuccessful, however, and he himself never became an actual resident of the State of Florida.

8. Pursuant to military assignments which the plaintiff received from the Air Force, he and Patricia Kay Morton moved to, and lived together in, the following places during the period from August 1960 until June of 1968:

(a) In Dayton, Ohio, from August 1960 to June 1961.

(b) In Smyrna, Georgia, from June 1961 to June 1963.

(c) In the Philippine Islands from June 1963 to June 1965.

(d) In Niagara Falls, New York, from June 1965 to June 1968.

9. (a) The plaintiff was assigned to military duty in Vietnam in June 1968; and he served there until June 1969.

(b) While the plaintiff was serving in Vietnam, Patricia Kay Morton and the Morton children lived in St. Petersburg, Florida.

10. When the plaintiff returned to the United States from Vietnam in 1969, he and Patricia Kay Morton bought their first home in Loudoun County, Virginia. They lived together there until Patricia Kay Morton left the plaintiff in 1973, under circumstances that will be described in subsequent findings.

11. (a) In August of 1973, the plaintiff was notified by the Air Force that his next military assignment would be in the State of Alaska. Patricia Kay Morton wished to return to Alabama, and she was unwilling to accompany the plaintiff to Alaska. The refusal of Patricia Kay Morton to accompany the plaintiff to Alaska was one of the important factors which caused Patricia Kay Morton and the plaintiff to separate in September of 1973.

(b) On September 15, 1973, in anticipation of their imminent separation, the plaintiff and Patricia Kay Morton signed a document entitled "Separation Agreement." This document provided in part as follows:

(1) The house in Loudoun County, Virginia, was to be the sole property of the plaintiff, who was to be responsible for paying off the mortgage; and the house was to be sold at the earliest feasible date by the plaintiff.

(2) A 1971 Volkswagen was to be the property of Patricia Kay Morton.

(3) A 1969 Volkswagen was to be the property of the plaintiff.

(4) Patricia Kay Morton was to have possession of all furniture and household goods, except one bedroom suite, one dining set, a rattan set, and the plaintiff's personal tools and professional books.

(5) Patricia Kay Morton was to have the sole custody and control of the two minor sons, with the plaintiff to have reasonable visitation rights.

(6) The plaintiff was to pay Patricia Kay Morton as separate maintenance payments that were to include support for both children, the sum of $500 per month beginning on October 5, 1973, and continuing for 30 months through March 5, 1976, and thereafter the sum of $200 per month beginning on April 5, 1976, and continuing for 33 months through December 5, 1978.

(c) The separation agreement also contained the following provision (among others):

> * * * Any decree entered in any action for divorce which may be requested by either party shall be agreed to by the other party and shall be consistent with the terms of this agreement and the court is requested to include this agreement in the decree. * * *

12. (a) On or about September 16, 1973, Patricia Kay Morton took the Morton children and moved to Alabama to live.

(b) The plaintiff continued to live in the Loudoun County house until he moved to Alaska in accordance with the Air Force assignment.

(c) After the plaintiff and Patricia Kay Morton separated, household goods for the use of Patricia Kay Morton and the Morton children were moved to Alabama in 1973 as part of the plaintiff's military household goods moving allowance.

(d) The plaintiff and Patricia Kay Morton have not lived together as man and wife since their separation in September 1973.

13. (a) In 1972 or earlier, the plaintiff had visited Alaska. When he first saw Alaska, the plaintiff changed his mind about establishing a domicile in Florida because he knew he wanted to make his permanent home in Alaska. As early as 1972, he orally asked the Air Force for an assignment to Alaska, but he did not receive such an assignment at that time. In 1973, he again asked for an assignment to Alaska, and on this occasion he received an assignment to Anchorage, Alaska, as of May 1974.

(b) The plaintiff left the former marital home in Loudoun County, Virginia, and moved to Alaska in May of 1974, pursuant to the Air Force assignment previously mentioned.

(c) In connection with his anticiapted move to Alaska, the plaintiff entered into a contract for the sale of the house in Loudoun County, Virginia, which he and Patricia Kay Morton had occupied as a married couple. However, shortly before the plaintiff left for Alaska, Patricia Kay Morton refused to sign the deed conveying the Loudoun County house to the purchasers with whom the plaintiff had contracted to sell the property. Up until that time, Patricia Kay Morton and the plaintiff had abided by the terms of the separation agreement dated September 15, 1973.

14. (a) When the plaintiff moved to Alaska in May of 1974, it was his intention to purchase a permanent home in Alaska and to establish a domicile in Alaska. He made his intention known at the time to associates.

(b) The plaintiff, an engineer who preferred outdoor work, thought that Alaska would provide for him great opportunities for employment after his retirement from the Air Force. Alaska has the Alaska Pipeline, an abundance of natural resources, and booming building and expansion jobs for engineers, in addition to being the most beautiful place, in the plaintiff's opinion, he had ever seen.

(c) In 1974, the plaintiff registered to vote in Alaska.

15. (a) On June 1, 1974, shortly after the plaintiff arrived in Alaska, he entered into a contract to purchase a permanent home for himself in Anchorage, Alaska, from Turner Construction Company, for a price of $62,100. It was the plaintiff's intention to finance this purchase partially with the proceeds from the sale of the house in Loudoun County, Virginia.

(b) The plaintiff was unable to consummate the contract referred to in paragraph (a) of this finding because of financial difficulties attributable to the refusal of

Patricia Kay Morton to sign the deed conveying the house in Loudoun County, Virginia, to the purchasers with whom the plaintiff had contracted for the sale of that house before moving to Alaska.

16. The plaintiff lived on the Air Force base to which he was assigned during his assignment in Alaska.

17. In June 1974, the plaintiff instructed the Air Force Finance Office to change his records to indicate that Alaska was his home State. This was done long before there was any statute commonly known as the Federal Garnishment of Wages Statute (42 U.S.C. § 659 (1976), as amended by Pub. L. 95-30, § 501, 91 Stat. 157).

18. (a) On October 16, 1975, the plaintiff married Ronnette Dreves in Anchorage, Alaska.

(b) The plaintiff and his second wife have two children: Keri L. Morton, born June 19, 1976; and Thomas Christopher Morton, born October 26, 1978.

19. The plaintiff lived in Alaska until 1977, when he was transferred to Andrews Air Force Base, Maryland.

20. (a) Because of Patricia Kay Morton's refusal to sign the deed conveying the house in Loudoun County, Virginia, to the purchasers with whom the plaintiff had contracted to sell the premises (see findings 13(c) and 15(b)), the plaintiff in July 1974, acting through counsel, filed a suit in the Circuit Court of Loudoun County, Virginia, against Patricia Kay Morton for specific performance of the separation agreement dated September 15, 1973.

(b) Patricia Kay Morton filed an answer; and in a prayer for affirmative relief, she asked that the separation agreement of Sptember 15, 1973, be rescinded and declared null and void.

(c) Before trial, Patricia Kay Morton filed a motion for leave to depose the plaintiff as an absent witness. In passing on this motion, the Circuit Court of Loudoun County determined that the plaintiff, a member of the Air Force on active duty, was making his home in Alaska.

(d) A trial was held in the Loudoun County proceeding on July 22, 1975. The evidence at the trial showed (among other things) that the plaintiff had paid Patricia Kay Morton the sum of $500 per month under the separation agreement, without having missed a payment.

(e) In a decree which the Circuit Court of Loudoun County entered on March 25, 1976, the separation agreement of September 15, 1973, was set aside, cancelled, and annulled.

(f) The plaintiff gave notice of appeal to the Supreme Court of Virginia from the March 25, 1976, decree of the Circuit Court of Loudoun County.

(g) During the pendency of the appeal, the plaintiff and Patricia Kay Morton settled all matters involved in the Virginia case, including the setting aside of the separation agreement. Under the settlement, Patricia Kay Morton was to receive $12,500 in cash from the sale of the Loudoun County house where the Mortons had maintained their marital residence from 1969 to September 1973, and she was permitted to keep all the personal property (furniture, china, silver, crystal, other valuables collected by the Mortons over the years) and the automobile which she had taken with her when she moved to Alabama from Virginia in September 1973.

(h) In view of the settlement between the plaintiff and Patricia Kay Morton, the Circuit Court of Loudoun County entered a final decree on June 10, 1976, dismissing the cause.

21. (a) In accordance with the settlement mentioned in finding 20, the plaintiff sold the house in Loudoun County, Virginia, and paid Patricia Kay Morton the sum of $12,500 from the proceeds of the sale.

(b) In addition to paying Patricia Kay Morton the sum of $12,500, the plaintiff voluntarily continued to make child support payments, as he felt that he was under a moral obligation to do so. The child support payments were at the rate of $500 per month until the older

child became 18 years of age, and then at the reduced rate of $250 a month for the younger child until Patricia Kay Morton began garnishing the plaintiff's pay under circumstances described in subsequent findings.

22. (a) On August 28, 1974, Patricia Kay Morton filed suit in the Circuit Court for the Tenth Judicial Circuit of Alabama against Colonel Morton for divorce, for the custody of the two minor children, together with support and maintenance for the children, and for alimony.

(b) Among the papers filed by Patricia Kay Morton in connection with the institution of the suit mentioned in paragraph (a) of this finding was a sworn affidavit executed by Patricia Kay Morton to the effect that Colonel Morton was at that time a nonresident of Alabama.

(c) Suit papers in the Alabama divorce proceeding were sent by registered mail to Colonel Morton in Alaska. He received them on September 17, 1974. No personal service was made on Colonel Morton at any time or at any place in connection with the Alabama divorce suit.

(d) Upon receiving the suit papers in the Alabama divorce proceeding, Colonel Morton promptly went to the Judge Advocate General's Office at Elmendorf Air Force Base, Alaska, and consulted an attorney in that office. The attorney advised Colonel Morton that service by mail was not sufficient to support a money judgment against him.

(e) Colonel Morton did not make an appearance of any kind in the Alabama divorce suit.

(f) There was no affidavit filed among the Alabama suit papers concerning Colonel Morton's military status, and no guardian ad litem was appointed for him, in accordance with section 200 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. § 520).

(g) The Alabama suit was dismissed for lack of prosecution on April 2, 1975. The dismissal was set aside a few days later, on April 9, 1975, without notice having been given to Colonel Morton.

(h) Colonel Morton having failed, within the time permitted, to plead or otherwise defend in the suit, judgment by default was entered against him on August 14, 1975, by the Circuit Court for the Tenth Judicial Circuit of Alabama. The judgment granted Patricia Kay Morton a divorce from Colonel Morton, it awarded to her the custody of the two children, and it ordered Colonel Morton to pay to Patricia Kay Morton the sum of $500 each month "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance of the * * * minor children."

(i) The separation agreement of September 15, 1973, between Colonel Morton and Patricia Kay Morton was not introduced before the court or made a part of the record in the Alabama divorce proceeding.

(j) There is no evidence that Colonel Morton committed any act against the marriage in Alabama. The marital disagreements out of which the divorce arose occurred in Virginia. Patricia Kay Morton left Colonel Morton in Virginia.

23. (a) On December 27, 1976, the Air Force Finance Office received by certified mail a writ of garnishment which had been issued by the Register of the Circuit Court for the Tenth Judicial Circuit of Alabama and which sought to garnish pay of the plaintiff in the amount of $4,100. The writ of garnishment was issued on the regular form used by the State of Alabama.

(b) The writ of garnishment was accompanied by a copy of the judgment that was entered in the divorce proceeding referred to in finding 22. The judgment recited that the present plaintiff was to pay $500 per month to Patricia Kay Morton "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance for the * * * minor children." Accompanying the writ was an affidavit executed by Patricia Kay Morton stating that the sum of $4,100 was due and owing "for alimony and child support" under the judgment dated August 14, 1975.

(c) The Air Force notified the plaintiff regarding the receipt of the writ of garnishment. The plaintiff thereupon sought advice from an attorney in the Judge Advocate General's Office at Elmendorf Air Force Base, Alaska. The attorney assured the plaintiff that Patricia Kay Morton could not legally garnish his pay on the basis of the service of process by mail from the State of Alabama.

(d) On December 30, 1976, the plaintiff presented to the Air Force Finance Office arguments to the effect that he had paid all his obligations to Patricia Kay Morton, that he was never properly served or notified of the Alabama divorce proceeding, that he was neither domiciled nor a resident of the State of Alabama, and that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction.

(e) On January 11, 1977, the Air Force Finance Office filed an answer in the Circuit Court for the Tenth Judicial Circuit of Alabama, confessing indebtedness of $4,100. This amount was subsequently deducted from the plaintiff's pay and was paid over to the clerk of the circuit court.

(f) It is inferred, and found, that the Finance Office did not seek advice from the Judge Advocate General's Office before taking the action referred to in paragraph (e) of this finding.

24. (a) Subsequently, other similar writs of garnishment issued by the Circuit Court for the Tenth Judicial Circuit of Alabama were served on the Air Force Finance Office, which honored the writs deducted amounts from the plaintiff's pay, and paid over such amounts to the clerk of the circuit court.

(b) The evidence in the record does not show whether—or, if so, when—the plaintiff was notified regarding these writs of garnishment.

25. The total amount which the Air Force Finance Office deducted from the plaintiff's pay and paid over to

the clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama pursuant to the writs of garnishment referred to in findings 23 and 24 is not shown by the evidence in the present record.

26. (a) All the writs of garnishment were served on, and honored by the Air Force Finance Office after Allan L. Morton was past the age of 18 and was married.

(b) Some of the plaintiff's pay was garnished after Brian D. Morton was past the age of 18.

27. When the law was changed to require that a military service include in a member's records the State wherein the member would be liable for state income taxes, the Air Force, without the plaintiff's consent and without checking with him, inserted in his leave and earnings statements the State of Alabama (the place from which he had entered the service) as the State to which he would pay state income taxes. Upon learning of this in June 1974, the plaintiff went to the Air Force Finance Office and asked that this error be corrected by showing Alaska as the State to which state income taxes would be paid. The requested correction was not made, however, until April 1976, after the plaintiff had been to the Finance Office three separate times and had, on three occasions, submitted a form to effect the change.

28. (a) The plaintiff and Patricia Kay Morton did not file any state income tax returns in Alabama for the several years during the 1957-72 period because the plaintiff did not consider himself to be a domiciliary of Alabama.

(b) In 1973, as indicated in finding 12(c), the plaintiff agreed to have Patricia Kay Morton's household goods moved to Alabama as a part of his military household goods move. It was his understanding that in order to do this, it was necessary that he file an Alabama income tax return for the year 1973; and, accordingly, in 1974 the plaintiff and Patricia Kay Morton filed a joint income tax return in Alabama for the year 1973. The Mortons also filed a state income tax return in Virginia

for the year 1973, as they were both residents of that State up until the middle of September 1973 and the plaintiff continued to reside there for the remainder of 1973.

(c) The plaintiff filed an income tax return in Alabama for the year 1974. In that year, the plaintiff and Patricia Kay Morton were litigating in the Circuit Court of Loudoun County, Virginia, over the separation agreement of September 15, 1973, but they were still married. Patricia Kay Morton was employed in Alabama and receiving income in that State, while the plaintiff's 1974 income was received partially in Virginia and partially in Alaska. The ultimate outcome of the Virginia litigation was unknown. The plaintiff reasoned that if the Virginia court should set aside the separation agreement and he lost the tax break of a unitary award tax deduction, Patricia Kay Morton might agree to amend their separate income tax returns and file income tax returns jointly with the plaintiff, because they were still married and they would both benefit by such joint filings. This did not happen, however.

(d) The plaintiff filed state income tax returns in Alaska for 1975 and subsequent years.

29. (a) The plaintiff has never registered to vote, and has never voted, in Alabama.

(b) The plaintiff registered to vote in Alaska in 1974.

30. The plaintiff has registered his automobiles in the States where he has been assigned by the Air Force. They have been registered in Georgia, the Philippine Islands, Virginia, Alaska, and Maryland. On one occasion, when the plaintiff was passing through Alabama and visited his sister in that State, he purchased an automobile in his sister's home town and registered it in Alabama. The evidence does not disclose when the automobile was registered in Alabama.

31. In 1974 and 1975, during the pendency of the divorce proceeding instituted by Patricia Kay Morton

against Colonel Morton, the State of Alabama did not have a "long-arm" statute authorizing personal service on nonresidents for child custody, child support, or maintenance and support. At that time, the Alabama rule permitting substituted service was limited to the termination of the marital status, in the absence of the necessary "minimum contacts" required for the Alabama court to exercise personal jurisdiction over a nonresident defendant.

32. On December 17, 1975, the plaintiff's counsel in the Virginia litigation wrote a rather lengthy letter to the plaintiff in Alaska relative to several matters, including the expenses that had been incurred up to that time in connection with the Virginia litigation, the status of the Loudoun County, Virginia, house, and the decree that had been entered by the Circuit Court for the Tenth Judicial Circuit of Alabama in the divorce case by Patricia Kay Morton against Colonel Morton. A paragraph of the letter dealing with the Loudoun County house included the following statement:

> • • • The last correspondence I had from you indicated that you were returning to the Washington area and wanted to live in the house yourself. You have an absolute right to do that. In fact, I was under the impression that you would have long since been back here.

33. On August 18, 1976, the plaintiff's counsel in the Virginia litigation wrote a letter to the plaintiff in Alaska. This letter included the following paragraphs:

> The last time I checked the Alabama law they could not serve residents by registered mail or serve them by a service in another state. For service of process on a legal resident, the service had to be made within Alabama. However, legislatures are changing the law daily and going to the position that domiciliaries, "legal residents", may be served by mail or by having a sheriff in another state serve

them personally. This would meet due process regulations under the "long-arm" statutes. So I strongly suggest you change your legal place of residence or you might get the old alimony award from the first Mrs. Morton in Alabama perfected, notice of which could be given by mail. You can't expect Alabama not to insist their original order was valid.

The best proof of your having changed your domicile is by voting and of course paying taxes in the new domicile.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court, the court concludes as a matter of law that the plaintiff is entitled to recover, and judgment is entered to that effect. The amount of the recovery will be determined in subsequent proceedings under Rule 131(c).

UNITED STATES CLAIMS COURT

No. 290-77

ALLAN WAYNE MORTON

v.

THE UNITED STATES

ORDER

Pursuant to the order of the United States Court of Appeals for the Federal Circuit, issued October 4, 1982, IT IS ORDERED that judgment is to be entered in accordance with the report, filed December 14, 1981 in this case, recommending a decision to the judges of the United States Court of Claims.

/s/ Alex Kozinski
ALEX KOZINSKI
Chief Judge

JUDGMENT

Pursuant to the above and Rule 58, IT IS ORDERED AND ADJUDGED that judgment is entered this date in this case as provided above.

Filed Oct. 8, 1982

/s/ Frank T. Peartree
FRANK T. PEARTREE
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN THE MATTER OF CASES TRANSFERRED TO THIS COURT PURSUANT TO PUBLIC LAW 97-164, Sec. 403

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, BALDWIN, KASHIWA, BENNETT, MILLER, SMITH and NIES, Circuit Judges.

ORDER

The court having considered the matter of cases pending in the Court of Claims and transferred to this court on 1 October 1982 pursuant to Public Law 97-164, Sec. 403, in each of which cases a decision and opinion had been recommended to the judges of the Court of Claims, IT IS HEREBY ORDERED:

That the United States Claims Court enter and transmit to this court as soon as possible a judgment corresponding to the decision recommended in each such case, which judgment will be deemed to be on appeal to this court.

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

4 October 82
Date

APPENDIX D

1. 42 U.S.C. (Supp. V) 659 provides:

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

* * * * *

(f) Non-liability of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

42 U.S.C. (Supp. V) 662(e) provides:

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which—

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

2. 5 C.F.R. 581.102(f) (amended 1983) provides:

"Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which may include an attachment, writ of execution, or court ordered wage assignment, which—

(1) Is issued by:

(i) A court of competent jurisdiction, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia;

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor the process; or

(iii) An authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law, and

(2) Is directed to, and the purpose of which is to compel, a governmental entity, to make a payment from moneys otherwise payable to an individual, to another party to satisfy a legal obligation of the individual to provide child support and/or make alimony payments.

5 C.F.R. 202(c) (amended 1983) provides:

Where it does not appear from the face of the process that it has been brought to enforce the legal obligation(s) defined in § 581.102(d) and/or (e), the process must be accompanied by a certified copy of the court order establishing such legal obligation(s).

Where the State or local law provides for the issuance of legal process without a support order, such other documentation establishing that it was brought to enforce legal obligation(s) defined in § 581.102 (d) and/or (e) must be submitted.

5 C.F.R. 302 (amended 1983) provides in part:

(a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:

* * * * *

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process;

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings;

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert . . . .

5 C.F.R. 581.305 (amended 1983) provides in part:

(a) The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

(4) It does not comply with the mandatory provisions of this part;

(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

(6) Where notice is received that the obligor has appealed the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the government entity is ordered by a court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending.

* * * * *

(d) Neither the United States, any disbursing officer, nor governmental entity shall be liable for any payment made from moneys due from, or payable by, the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this part. However, where a governmental entity negligently fails to comply with legal process, the United States shall be liable

for the amount that the governmental entity would have paid, if the legal process had been properly honored.

3. 48 Fed. Reg. 26279-26294 (1983) amended the pertinent provisions of § 5 C.F.R. Pt. 581 (1983) as follows:

1. In § 581.102, paragraph (f) (1) (ii) is revised to read as follows:

§ 581.102 Definitions.

* * * * *

(f) * * *

(1) * * *

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement that requires the United States to honor such process; or

* * * * *

9. In § 581.305, paragraph (a) (6) is revised and paragraph (f) is added to read as follows:

§ 581.305 Honoring legal process.

(a) * * *

(6) Where notice is received that the obligor has appealed either the legal process or the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by the court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending. Where the legal process has been issued by a court in the District of Columbia, a motion to quash shall be deemed equivalent to an appeal.

* * * * *

(f) If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1853

BRUCE WARREN RUSH, APPELLANT

v.

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: Mikva, Edwards and Scalia, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* D.C. Cir. Rule 13(c). On consideration of the reasons set forth in the attached memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed.

It is FURTHER ORDERED, by this Court, *sua sponte*, that the clerk shall withhold issuance of the mandate herein until seven days after disposition of any

timely petition for rehearing. See D.C. Cir. Rule 14, as amended November 30, 1981 and June 15, 1982.

PER CURIAM
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed: April 26, 1982

Rush v. U.S. Agency for International Development, No. 82-1853 (Filed April 26, 1983)

MEMORANDUM

Bruce Warren Rush appeals from the district court's dismissal of his complaint against the United States Agency for International Development (AID) and its administrator. Rush, an AID employee, seeks to prevent AID from complying with a Florida garnishment order that requires the agency to withhold a portion of Rush's salary. He also seeks a return of previously garnished monies. The garnishment was ordered by a Florida state court in 1979 and served on AID pursuant to 42 U.S.C. § 659 (Supp. IV 1980) after Rush failed to make child support payments required by the state court in an earlier divorce judgment. The support order grew out of a divorce action Rush brought in 1976.

Rush alleges that the district court should not have accorded the Florida judgment and garnishment order full faith and credit because of various defects in the judgment. In particular, Rush alleges that the Florida judgment is void because, *inter alia*, the judge who entered judgment was not the same judge who heard the trial testimony, the underlying marriage on which the divorce decree was premised was invalid, the woman who contested the divorce was not his wife, and the child for whom the Florida court ordered support payments was not his offspring. Finally, Rush alleges that AID violated his constitutional rights by recognizing a judgment rendered by a court which lacked jurisdiction over him.

Under the principle that the United States cannot be sued without its consent, sovereign immunity traditionally has prohibited the enforcement of garnishment orders directed at monies received from the government by federal employees. *See Federal Housing Administration v. Burr*, 309 U.S. 242 (1940). Since the original enactment of the federal garnishment statute in 1975, however, this immunity has been subject to a limited

waiver encompassing garnishment orders, issued by courts of competent jurisdiction, that enforce alimony and child support obligations. 42 U.S.C. § 659(a) (Supp. IV 1980); *see* 5 C.F.R. §§ 581.101-.501 (1983). At the same time, the liability of the United States, its agencies, and its officers for withholding or redirecting payments under the statute is strictly limited if the garnishment is made pursuant to "legal process regular on its face" and in accordance with the statute and its implementing regulations. 42 U.S.C. § 659(f) (Supp. IV 1980). In the present case, Rush has not claimed that the garnishment order was facially invalid or that AID violated statutory requirements or applicable regulations. Thus, at least to the extent that Rush seeks reimbursement of funds previously garnished, he is barred by the statute from litigating those claims against AID or its administrator.

To the extent that Rush seeks injunctive relief, most notably for the constitutional claims that he raises, the district court correctly premised its jurisdiction on 28 U.S.C. § 1331 (Supp. V 1981). But Rush is properly foreclosed from litigating in federal court the merits of the divorce decree or the garnishment order issued by the Florida courts. Under 28 U.S.C. § 1738 (1976), federal courts, absent circumstances not present here, must give full faith and credit to state court judgments. Moreover, the alleged constitutional defects in the Florida judgments that might be remediable in federal court are wholly without merit, as the district court held.

In reaching our decision, we do not attempt to decide the merits of those claims raised by Rush that question the propriety of the actions taken by the Florida courts. Rather, consistent with the general policy that domestic relations is a field peculiarly suited to state regulation and control, we only mean to suggest that the Florida state courts, and not the federal courts, are the appropriate forum for litigating these claims. Rush must seek his relief from the Florida courts.

APPENDIX F

[SEAL]

THE COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

DECISION

File: B-203668

Date: February 2, 1982

MATTER OF: Technical Sergeant Harry E. Mathews, USAF

DIGEST: The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. § 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. § 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face.

This action is in response to an appeal by Technical Sergeant Harry E. Mathews, USAF, of our Claims Group's disallowance of his claim for reimbursement of amounts withheld from his pay and for other expenses he incurred pursuant to the garnishment of his Air Force pay during the period June 1976 through May 1980. The pay Sergeant Mathews is claiming was withheld by the Department of the Air Force pursuant to an

order for child support issued by a Florida Circuit Court in March 1976. There is no authority to reimburse the claimant for pay garnished under an order which, at the time the pay was garnished, was valid on its face, nor is there authority to reimburse him for other expenses he incurred in connection with the garnishment.

In 1976, while Sergeant Mathews was assigned overseas, he received notice that, due to a lawsuit brought against him in Florida for child support, a Florida state court had issued a garnishment order against his pay. Under the order, his pay was to be garnished until December 1992, and an arrearage of $1,150 was also to be collected. The Air Force determined that the order was valid on its face and began complying with it by withholding the required amounts from his pay. Contending that he had no prior notice of the lawsuit, and that it was based on fraud, Sergeant Mathews sought help from the Government to challenge the order. However, since it was primarily a private matter, the Air Force advised him to seek civilian counsel to challenge the order in the Florida courts.

Sergeant Mathews contends that he encountered difficulty in securing civilian counsel. He also states that the hearing date on his Motion for Relief from Judgment was postponed several times and that, for an extended period of time, his file was missing from the appropriate court, causing further delay. Throughout this time, payments of $151.67 a month plus $50 a month in payment of the arrearage were garnished from his pay.

In May 1980, he was heard in the Florida court on a Motion for Relief from Judgment, and by order dated May 20, 1980, a judge of the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida, ordered the garnishment set aside. On the basis that this order indictates that the garnishment should never have taken place, Sergeant Mathews filed a claim with the Air Force for reimbursement of the amount paid during the period

June 1976 through May 1980 as well as other expenses he indicates arose out of the matter. The Air Force Accounting and Finance Center, noting that it found no basis for reimbursement, sent the claim to our Claims Group which disallowed it on September 2, 1980.

The issue in this case is whether the Government is authorized to reimburse a service member for money garnished from his pay pursuant to a state court order to which the Government is subjected under 42 U.S.C. § 659, when the order has been overturned. The order in this case was set aside presumably due to insufficient personal jurisdiction by the court over the member.

Under the provisions of 42 U.S.C. § 659 (Supp. III, 1979) the Government has waived its sovereign immunity for the limited purpose of subjecting itself to state actions to garnish the pay of its employees and members of the Armed Forces but only when garnishment is to provide child support and alimony. When the Air Force was served with a garnishment order valid on its face it was required to comply with it, and the Government incurred no liability to Sergeant Mathews in doing so. Thus, where an order appears regular on its face, the Government must garnish wages to make payment, and in fact, may be held liable if it fails to do so. See 56 Comp. Gen. 592 (1977). See also 42 U.S.C. § 659(f) which specifically provides that neither the United States, any disbursing officer, nor governmental entity is liable for payments made under this authority "pursuant to legal process regular on its face."

The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular "on its face" means just that. Facial validity of a writ need not be determined "upon the basis of scrutiny by a trained legal mind," nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing

the writ may know. *Aetna Insurance Co.* v. *Blumenthal*, 29 A.2d 751, 754 (Conn. 1943).

As is indicated above, when the Air Force received the garnishment order, they reviewed it and found it valid on its face and in conformity with the Florida law. Sergeant Mathews has not shown that that finding was incorrect. Instead, he argued that the order was invalid because it was obtained by fraud, and that he had not been properly served in the original court action against him. As the Air Force advised him, these were matters for him to litigate in the courts and not for the Air Force to decide. That is, they were not challenges to the facial validity of the garnishment order. While the order was set aside in 1980, it was valid at the time payment was being made under it, and the Government had a duty to comply with it until the court modified it. There is no authority for reimbursement of the amounts withheld from Sergeant Mathews' pay, nor is there authority to reimburse him for the legal and other expenses he claims he incurred in having the order overturned.

Accordingly, the disallowance of the claim is sustained.

/s/ Milton J. Socolar
Acting Comptroller General
of the United States

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